VOLUME III
1958

Race Relations Law Reporter

VANDERBILT UNIVERSITY SCHOOL OF LAW

Recent Developments . . . A Summary

Education

School officials in Dallas, *Texas*, were relieved of a district court order to integrate schools there in January, 1958, (p. 17). The Court of Appeals for the Fifth Circuit, however, allowed to stand its previous order to proceed to integrate "with all deliberate speed." The district court had construed an earlier appeal opinion to require immediate integration. Also in *Texas*, the governor of that state called a special session of the legislature, suggesting enactment of statutory authority for the closing of schools if federal troops were used to effect integration (p. 87). Subsequently, the legislature approved bills to allow such closing (p. 87), and to provide legal assistance to school boards "in any Federal Court lawsuit challenging constitutionality of a state statute" (p. 89). The constitutionality of one proposed school closing bill was challenged by the Texas attorney general in a formal opinion (p. 123).

In *Virginia*, a mother of white children was rebuffed in her efforts to have declared invalid that state's Pupil Placement Act (p. 21). The Supreme Court of Appeals of Virginia held the act was within the state's general legislative powers, and noted that there was no specific contention that the statute deprived the plaintiff of the equal protection of the laws as guaranteed by the Fourteenth Amendment.

A Federal district court in *Oklahoma* directed the Preston school district to commence integration by September, 1958 (p. 12). In another action in the same court, Negro pupils were declared to be eligible to attend previously all-white schools in the Morris district (p. 11), but the court declined to issue an injunction when the defendant school board agreed with the rights asserted.

The Nashville, *Tennessee*, School Board, under order to submit a plan for desegregation, offered the United States District Court a "Parents' Preference Plan" (p. 15). The proposal, which was subsequently rejected, would have provided for three types of schools—white only, Negro only, and integrated—at the option of each child's parents.

The Supreme Court of *Kansas* directed the Bonner Springs School Board to desegregate its schools (p. 7), holding that segregation as practiced in that city was unlawful under Kansas statutes even before the United States Supreme Court decision in the *School Segregation Cases*.

Employment

Negro steelworkers in *Texas* who contended that a union contract providing two "lines of progression" was discriminatory were denied relief (p. 55). The court held that Negroes participated fully in union activities, the company's promotion policies were reasonable according to industry standards, and there was no evidence of discrimination in form or practice.

The United States Supreme Court declined to review the dismissal by an *Ohio* district court of a suit by Negroes alleging discrimination because of a membership bar by a railway brotherhood (p. 6).

Housing

New York City has enacted an ordinance prohibiting discrimination on the basis of race, color, religion, natural origin or ancestry in the sale, rental or leasing of "multiple dwelling" private housing (p. 92).

A *Pennsylvania* state court has granted a temporary injunction against persons who demonstrated when a Negro purchased a home in Levittown (p. 49).

Organizations

The attorney general of *Georgia* submitted to mayors of cities in that state a proposed ordinance requiring the registration and filing of certain information by organizations on the request of city officials (p. 128). A statute requiring similar registration and filing of informa-

tion was approved by the *Texas* legislature (p. 90).

In the *District of Columbia*, a Federal district court ruled that a "police boy's club," supported by public subscription and municipal aid, is not engaged in "governmental action" so as to bring it within the Fifth Amendment and preclude segregation (p. 23).

Public Accommodations

Suit by a white woman denied service with her Negro husband in a *District of Columbia* restaurant was dismissed by a Federal court which held that the district ordinance sued under was penal rather than civil in nature, at least insofar as this plaintiff is concerned (p. 37). A *California* court held that state's "Civil Rights Act" extended to service in a shoe store (p. 43). A commissioner of the *New York* State Commission Against Discrimination found "probable cause" to credit allegations of religious discrimination against a *Virginia* resort hotel, but recommended the case be closed because the hotel had closed its New York office (p. 113).

Skating rinks were declared to be under the provisions of the *Pennsylvania* Civil Rights Law by a state court there (p. 45). A "membership" requirement was rejected as a subterfuge.

Other Developments

Ralph Dupas, a professional boxer, successfully brought suit to require the City of New Orleans, *Louisiana*, to issue him a delayed "white" birth certificate (p. 80).

The *Texas* Legislature approved resolutions questioning the authority for troop use in the Little Rock, *Arkansas* integration situation (p. 96), proposing a constitutional convention to delineate fully federal-state relationships (p. 96), and suggesting standards of judicial experience for prospective justices of the United States Supreme Court (p. 95).

The "Boatwright Committee" of the *Virginia* General Assembly has issued a report of its investigation into activities of organizations accused of promotion or support of litigation (p. 98).

Reference

The substance, history, and judicial application of Federal Civil Rights Legislation is discussed in a background study beginning at Page 133. A table of cases in this issue, arranged alphabetically and in reverse and original form, appears at page 163.

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UNITED STATES SUPREME COURT

ALIENS
Immigration—Federal Statutes

UNITED STATES ex rel. LEE KUM HOY et al. v. John L. MURFF, District Director of Immigration and Naturalization Service.

United States Supreme Court, December 9, 1957, —— U.S. ——, 78 S.Ct. 203, 26 L.W. 4048.

SUMMARY: Chinese seeking admission to the United States as citizens by virtue of being the children of United States citizens were denied admission and detained by the Immigration and Naturalization Service. The denial of admission was based, in part, on the results of blood tests conducted on the purported citizen father and the persons seeking admission which negatived paternity. The Chinese sought a writ of habeas corpus in federal district court, alleging, in part, that the use of blood tests by the Service was confined solely to Chinese and was thus discriminatory. On the first hearing of the case the court held that the Chinese had been denied due process of law through denial by the Board of Special Inquiry of opportunities for them to challenge the results of the blood tests. (*Sub nom. U. S. ex rel. Lee Kum Hoy v. Shaughnessy,* 115 F.Supp. 302 (S.D. N.Y. 1953)). Following further hearing the Board again denied admission to the Chinese. The petition for habeas corpus was renewed. At this trial the court held that the use of blood tests was not, in itself, a denial of due process, but would be so if the tests were administered solely to Chinese. The court ordered the writ sustained unless a further hearing was held by the Board on the question of possible discriminatory application of blood tests. 123 F.Supp. 674, 1 Race Rel. L. Rep. 225 (1954). A further hearing by a Special Inquiry Officer was conducted at which it was determined that discrimination was not practiced. This finding was sustained by the Board of Immigration Appeals. The petition for habeas corpus was again renewed before the federal district court. At this trial the court found that the practice of requiring blood tests to establish paternity of persons claiming derivative citizenship was applied only to Chinese and that the petitioners, but for the fact that they were Chinese, would have been admitted on the other proofs adduced. The court issued the writ. 133 F.Supp. 850, 2 Race Rel. L. Rep. 189 (1955). On appeal the Court of Appeals for the Second Circuit reversed and ordered the writ of habeas corpus discharged. The Court of Appeals held that there was no evidence that the Bureau of Immigration and Naturalization was actuated by racial prejudice in administering the blood tests to Chinese and that, under the peculiar circumstances, the tests were a valid means of establishing the truth of claims of citizenship. 237 F.2d 307, 2 Race Rel. L. Rep. 193 (2d Cir. 1956). The Supreme Court granted certiorari "limited to the question of whether there was unconstitutional discrimination against petitioners by the use of blood tests in determination of their application for entry to this country." 352 U.S. 966 (1957). A motion to substitute John L. Murff as party respondent was granted. 2 Race Rel. L. Rep. 1097. After hearing the Supreme Court remanded the case for further hearings before the Bureau on the basis of "new, accurate blood grouping tests" to determine the excludibility of the petitioners. The Court, on assurance that the blood tests were conducted without discrimination on the basis of race, declined to pass on the claim of unconstitutional discrimination. The *per curiam* opinion of the court follows:

In view of the representation in the Solicitor General's argument at the Bar that the blood grouping test requirement here involved is presently and has been for some time applied without discrimination "in every case, irrespective of race, whenever deemed necessary," and in view of our remand of the case, we need not now pass upon the claim of unconstitutional discrimination.

It appearing that the blood grouping tests made herein were in some respects inaccurate and the reports thereof partly erroneous and conflicting, the judgments heretofore entered are vacated and the case is remanded to the District Court with directions that the hearings before the Special Inquiry Officer or a Board of Special Inquiry be reopened, so that new, accurate blood grouping tests may be made under appropriate circumstances, and that relevant evidence may be received as offered on the issues involved. The excludibility of petitioners remains to be determined upon those proceedings.

TRIAL PROCEDURE
Assistance of Counsel—Michigan

Willie B. MOORE v. State of MICHIGAN

United States Supreme Court, December 9, 1957,..... U.S. ....., 78 S.Ct. 191, 26 L.W. 4023.

SUMMARY: Moore, a Negro, was convicted of murder on a plea of guilty in a Michigan state court in 1938. At the time of his conviction he was seventeen years of age and had completed the seventh grade in school. The victim of the homicide was an elderly white woman. Moore was sentenced to solitary confinement for life. In 1950 he filed a delayed motion for a new trial, asserting constitutional invalidity of his conviction and sentence because he did not have the assistance of counsel at the time of entering his plea of guilty. The motion for a new trial was denied and the Michigan Supreme Court affirmed the denial. The United States Supreme Court granted a petition for certiorari. The Supreme Court, in a "five-four" decision, reversed the judgment and remanded the cause. A majority of the court found that the circumstances existing at the time of entering the guilty plea, including a fear of mob violence and Moore's age and intelligence, precluded an intelligent waiver of his right to be advised by counsel before entering the plea. The four dissenting justices would have affirmed the judgment on the ground that the issues were of fact which had been decided adversely to Moore three times by Michigan state courts.

MISCELLANEOUS ORDERS
The United States Supreme Court:

Reeves v. State of Alabama, January 13, 1958, ... U.S. ....., 78 S.Ct. 363. Allegations of systematic exclusion of Negroes from the grand and trial juries were found unsupported by the Supreme Court of Alabama, 88 So.2d 561, 1 Race Rel. L. Rep. 697 (1956). After granting certiorari, 352 U.S. 965, 77 S.Ct. 373, 2 Race Rel. L. Rep. 779 (1957), the Supreme Court of the United States entered the following order on January 13, 1958. "PER CURIAM. The writ of certiorari is dismissed as improvidently granted. Mr. Justice DOUGLAS dissents."

Denied certiorari (i.e., declined to review) in the following cases:

Oliphant v. Brotherhood of Locomotive Firemen and Enginemen (Prior decision 156 F.Supp. 89, 2 Race Rel. L. Rep. 1128 [N.D. Ohio 1957], in which a federal district court dismissed an action brought by Negro railway employees against a labor union which had refused to admit Negroes to membership.) No. 436, December 9, 1957, ... U.S. ....., 78 S.Ct. 266.

Haile v. Eastern Band of Cherokee Indians (Prior decision 246 F.2d 293, 2 Race Rel. L. Rep. 1137 [4th Cir. 1957], in which an action for damages brought against the United States and an Indian tribe was dismissed and the dismissal affirmed by the Court of Appeals.) No. 540, December 9, 1957, ... U.S. ..... 78 S.Ct. 268.

COURTS

EDUCATION
Public Schools—Kansas

Dennis CAMERON, a minor, by his parents and next friends, Clifford Williamson, et al. v. THE BOARD OF EDUCATION OF THE CITY OF BONNER SPRINGS of the State of Kansas, a corporation, et al.

Supreme Court of Kansas, December 7, 1957, 318 P.2d 988.

SUMMARY: Negro school children and their parents as next friends brought an original mandamus action in the Supreme Court of Kansas to compel the Bonner Springs school board to permit the minor plaintiffs to enroll in common grade schools which had been attended exclusively by white children. The court held that the *School Segregation Cases* had invalidated a Kansas statute which had granted cities of the first class, except Wichita, authority to maintain separate schools. Bonner Springs, being a city of the second class, had never been authorized to maintain segregated schools. Holding such action to be in violation of the Fourteenth Amendment, the court adjudged that a peremptory writ of mandamus issue directing the defendants to integrate the public grade schools of Bonner Springs in no event later than the fall term of school in 1958.

SYLLABUS BY THE COURT

Constitutional Law—*Equal Protection of Law—Public Schools.* The maintenance of a separate grade school for the attendance of Negro school children by the school district of Bonner Springs, Kansas, is held unlawful and unconstitutional in that it deprives the children of the minority group of equal educational opportunities and amounts to a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

Schroeder, J.

This is an original action in mandamus brought by fourteen Negro pupils of the school district of the City of Bonner Springs in Wyandotte County, Kansas, and their parents as next friends, to compel the school board, its members as individuals, and the superintendent to permit these pupils to enroll and attend the McDaniel and Southwest Common Grade Schools, which were maintained exclusively for white children prior to the commencement of these proceedings.

The question presented is whether the Board of Education is authorized to establish and maintain separate grade schools for the education of white and colored children within the school district.

Upon the filing of the original motion for a writ of mandamus in this court an alternative writ was issued. Parties are not in agreement as to whether the defendants have complied with the alternative writ. Casting aside technicalities, we consider it immaterial and are, therefore, not disposed to labor this point. The facts admitted by the record before this court disclose that one of the plaintiffs, a Negro pupil by the name of Leona Davis, is presently attending the Lincoln Grade School in Bonner Springs, Kansas.

The motion for writ of mandamus states that plaintiffs on September 4, 1956, made a formal demand upon the Board of Education of the City of Bonner Springs to cease and desist from separating their children from the white children on the basis of race and color, and further states that said Board has established and maintains a separate common school, known as Lincoln Grade School, for the exclusive attendance of

Negro school children in Bonner Springs, a city of the second class.

[*Defendants' Answer*]

The defendants' answer to the alternative writ of mandamus admits "... that since the establishment of the elementary schools within said District the building designated as Lincoln school was established for the attendance of negro school children, but defendants specifically deny that they did force said negro children to attend said grade school..."

The foregoing together with other matters contained in the record make it clear that the Board of Education of the City of Bonner Springs, a city of the second class, is, in truth and in fact, maintaining Lincoln Grade School as a segregated public school for colored children. This is unlawful.

Prior to recent decisions of the United States Supreme Court in 1954, the Kansas legislature had power under the State Constitution to separate the white and colored races in public schools by a legislative act and could confer that power on Boards of Education under the "separate but equal" doctrine in the case of Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256. (See, Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274; and Richardson v. Board of Education, 72 Kan. 629, 84 Pac. 538.)

The Kansas legislature exercised this power by the enactment of a statute granting cities of the first class, except Wichita, authority to organize and maintain separate schools for the education of white and colored children (now G. S. 1949, 72-1724), and this statute was held valid in Wright v. Board of Education, 129 Kan. 852, 284 Pac. 363. (See, Rowles v. Board of Education, 76 Kan. 361, 91 Pac. 88; and Thurman-Watts v. Board of Education, 115 Kan. 328, 222 Pac. 123.)

The Kansas legislature did not, however, grant Boards of Education of cities of the second class and other school districts statutory authority to segregate colored pupils from white pupils, and they therefore had no such power, express or implied. (Webb v. School District, 167 Kan. 395, 206 P. 2d 1054; Board of Education v. Tinnon, 26 Kan. 1; Knox v. Board of Education, 45 Kan. 152, 25 Pac. 616; Cartwright v. Board of Education, 73 Kan. 32, 84 Pac. 382; and Woolridge v. Board of Education, 98 Kan. 397, 157 Pac. 1184.) Furthermore, Boards of Education of cities of the second class and other school districts, except cities of the first class, had no power or authority to maintain segregated schools either by choice or desire of the colored people themselves, or by mutual agreement on the part of both the white and colored races. (Knox v. Board of Education, supra.)

[*Cases Superseded*]

The foregoing cases have been superseded by Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A. L. R. 2d 1180 (amplified, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083); and Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884, decided May 17, 1954. These decisions have invalidated G. S. 1949, 72-1724, on the ground that it is unconstitutional.

In the Brown case the United States Supreme Court held that segregation of white and Negro children in public schools of a state solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment, even though the physical facilities or other "tangible" factors of white and Negro schools may be equal. It rejected the "separate but equal" doctrine adopted in Plessy v. Ferguson, supra, as having no place in the field of public education.

We therefore hold that the maintenance of a segregated grade school for colored children by the Board of Education of the City of Bonner Springs is racial discrimination in public education and must yield to the principle that such discrimination is unconstitutional in that it deprives the children of the minority group of equal educational opportunities. It amounts to a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

It is, therefore, by the court ordered and adjudged that a peremptory writ of mandamus issue to each and all of the named defendants, directing them to proceed with reasonable diligence to integrate the public grade schools in the school district of Bonner Springs, Wyandotte County, Kansas, and to comply with the order of this court in no event later than the commencement of the fall term of school in 1958.

The costs of this action are taxed to the defendants.

It is so ordered.

EDUCATION
Public Schools—Kentucky

Hugh C. SPALDING et al. v. Mrs. Charles WOOLEY et al.

Court of Appeals of Kentucky, November 15, 1957.

SUMMARY: Citizens of Marion County, Kentucky, brought an action in a Kentucky state court seeking to require the county Board of Education to reopen a high school and to provide adequate non-sectarian instruction in a county high school. The trial court ruled adversely to their contentions and they appealed to the Kentucky Court of Appeals. The Court of Appeals held that the board had acted arbitrarily, reversed the judgment and remanded the case with instructions to the trial court to enter a decree requiring the re-establishment of an adequate high school system. 293 S.W.2d 563 (1956). The trial court entered a decree requiring the board to establish a single, new, centrally located high school for the county and to have the school ready for operation by September 1, 1959. The board appealed this order, contending that it was a wrongful interference with the discretion of the board in operating the school system. The citizen plaintiffs cross-appealed. The Court of Appeals modified and affirmed the order. Although no question of race or color is presented, the decision is printed because of the problems of school administration which are discussed.

CULLEN, Commissioner.

On a former appeal in this case, Wooley v. Spalding, Ky., 293 S.W.2d 563, a mandate was issued directing the Franklin Circuit Court to enter a judgment granting a mandatory injunction requiring the board of education and the county superintendent of schools of Marion County to re-establish, as soon as practicable, a high school system that will afford all children of the county equal educational opportunities. After some further proceedings in the circuit court, judgment was entered requiring the board of education to establish a single, new, centrally located high school to accommodate all of the high school pupils of the county school district, and to have the school ready for operation by September 1, 1959. The board of education and the superintendent have appealed, maintaining that the judgment constitutes a wrongful interference with the discretion of the board in the operation of the school system, and that an alternative plan proposed by the State Board of Education should have been approved. The plaintiff citizens and taxpayers have cross-appealed, contending that the judgment should have ordered re-establishment of the Bradfordsville High School pending construction of the new central high school.

As pointed out in the former opinion, this litigation arose out of the discontinuance of the Bradfordsville High School, in the Southeastern part of the county. For several years, the children in the northeastern part of the county had been attending the city high school in Lebanon, with their tuition being paid by the county school district. After the closing of the Bradfordsville High School, provision was made for the students from that area to attend the city school at Lebanon on the same basis. Children in the western part of the county continued to be accommodated at the two county high schools at St. Charles and St. Francis.

[*Prior Mandate*]

In our opinion on the former appeal, 293 S.W.2d 563 at page 567, we said:

> "* * * We direct the circuit court to issue an injunction requiring the County Board of Education and the Superintendent of County Schools, as soon as practicable, to establish a high school system that will afford all children in the county equal educational opportunities. So long as the board of education chooses to continue a system of regional or area high schools, compliance with the injunction will require re-establishment of a four-year high school in the eastern section of the county. However, the board will have the alternative of compliance by establishing a system based on a centrally located county high school. The circuit court may consider all problems that may arise in effectuating good faith compliance with the court's order. During this

period of transition, the circuit court will retain jurisdiction of the case."

Upon receiving the mandate on the former appeal, the circuit court directed the State Department of Education and the Marion County Board of Education to submit a plan that would give effect to the mandate.

The State Department of Education made a survey of the situation and submitted a report with recommendations in substance as follows:

1. The high school students of the county "can best be served ultimately in a centrally located high school in or near the City of Lebanon." However, the school district could finance a bond issue of only $400,000, and "it is the opinion of the Department of Education that an adequate central high school could not be constructed for this amount."

2. To construct a new regional high school in the eastern part of the county would be impracticable because (1) it would exhaust the financial resources of the district; (2) it would duplicate facilities at the Lebanon city school and would eventually destroy the city school; and (3) it would render impossible the accomplishment in the forseeable future of the ultimate goal of a single, central high school.

3. The re-establishment of the old school at Bradfordsville would not achieve the purpose of providing equal eduçational opportunities for the children of the eastern part of the county.

4. The most satisfactory solution of the problem would be for the county district to enter into an agreement with the city school board of Lebanon for joint operation of the city high school, as a school for the children of the eastern part of the county. Also, the high school at St. Francis should be discontinued, and the one at St. Charles should serve as the school for the western part of the county.

The county school board and the city school board agreed to the proposal for joint operation of the city school at Lebanon, and the county school board indicated its willingness to discontinue the school at St. Francis. This plan was submitted to the circuit court, but the court found that it did not comply with the decision and mandate on the former appeal of this case.

We agree with the conclusion of the circuit court that the proposed plan does not comply with our former decision and mandate. The proposal is just one slight degree removed from the tuition agreement which we held on the former appeal did not produce substantial equality of educational opportunities. It does not tend towards elimination of sectarianism. It would leave the door open for constant dispute over equality and fairness in the expenditure of the school funds.

[*Court Acted Properly*]

Our former opinion gave the county board of education a choice between two alternatives. The board did not choose either one. Accordingly, we think it was within the power of the circuit court to make the choice for the board, as the court did in directing the establishment of a single, centrally located high school.

The only material objection voiced to the centrally located high school is that the school district is financially unable at the present time to construct such a school. As a basis for this objection we have only the *opinion* of the State Board of Education, based upon a brief survey of the county school system. It well may be that a suitable building to accommodate all of the high school students could be constructed for $400,000. Perhaps a purchaser could be found for the St. Charles and St. Francis school buildings, which would provide additional funds. A survey of families might show that a number of children would elect to attend a private or parochial school rather than the central, public high school, which would reduce the accommodation requirements of the building. It is conceivable that the city school district would agree to a consolidation with the county district, which would provide additional financial resources and could result in utilization of some existing facilities in the city. Such a consolidation would be considered a compliance with the judgment.

The county board of education can proceed immediately with the planning for a central high school. If, after exerting all reasonable efforts and exploring all reasonable prospects it appears convincingly that the contruction of a central high school is financially impossible, or that the prescribed time limit for construction cannot be

met, the circuit court can modify the judgment as seems necessary.

[*Interim Operation*]

The judgment makes no provision for operation of the high school system, pending construction of the new central high school, other than to direct that no permanent improvements or additions be made to the schools at St. Charles and St. Francis. The appellees, on cross-appeal, urge that the Bradfordsville school should be reopened during the interim period. We are convinced, however, that better educational opportunities are being furnished at the Lebanon city school than could be at Bradfordsville. Also, reopening of the Bradfordsville school would merely fan the dying flames of controversy.

We believe that during the interim period pending construction of the new school the children of the eastern part of the county will best be served by adoption of the joint operating agreement for the Lebanon city school, as proposed by the State Board of Education, or if for practical reasons that cannot be done during the balance of the present school year and for the following school year, then by continuing the present tuition agreement.

During the interim period the county board of education will be enjoined from furnishing free transportation to, or paying tuition of, any high school student for attendance at any school other than the one most accessible to his place of residence.

On the cross-appeal the judgment is affirmed. On the direct appeal the judgment, construed to embody the modifications set forth in this opinion, is affirmed.

EDUCATION
Public Schools—Oklahoma

Thurman BROWN, Jr., Billy Don and Norma Bell Brown, Minors, by their father and next friend, Thurman Brown, Sr., et al. v. W. E. (Bill) LONG, as President, and Mrs. Edith Wilson, as Secretary, of the Morris Independent School District of Okmulgee County, Oklahoma, et al.

United States District Court, Eastern District, Oklahoma, September 21, 1957, Civ. No. 4245.

SUMMARY: A declaratory judgment and an injunction was sought by Negro school children in Morris, Oklahoma, in an action brought in federal district court to require their admission to public schools without regard to race or color. At the hearing the school officials admitted the right of the plaintiffs to attend schools without discrimination on the basis of race. Counsel agreed that the rights of those plaintiffs who had already entered other schools for the current school year presented an administrative matter to be determined by school authorities. The court declared the right of the plaintiffs to attend school without discrimination but declined to issue an injunction.

RICE, District Judge.

DECLARATORY JUDGMENT

This cause came on for hearing by the Court without a jury on the 21st day of September, 1957. The minor plaintiffs appeared by their respective parents as next friends and by their attorneys of record. The defendants appeared in person and by their attorneys of record. The defendants withdrew their Motion to Dismiss and the plaintiffs withdrew their Motion for Summary Judgment, all with leave of Court first sought and obtained, and the defendants thereupon, with leave of Court, filed their Answer to the plaintiffs' Complaint. Both parties thereupon announced ready and agreed in open Court that this case may be determined on its merits at this hearing.

Upon consideration of the opening statements by counsel for plaintiffs and defendants the Court is of the opinion that while a controversy

between the parties may have existed at the time this action was filed, there is no substantial controversy between the plaintiffs and defendants as to the rights of the plaintiffs at this time. At the conclusion of statements by counsel both parties agreed that a declaratory judgment defining the rights of the plaintiffs may be entered upon the statements of counsel.

The attorneys for plaintiffs and defendants agreed in open Court that all Negro minor children of school age who reside within the Morris Independent School District, except the four plaintiffs hereinafter named, have transferred to and are attending Public Schools outside the geographic limits of said defendant School District, and that the right of said students who have so transferred is an administrative matter to be determined by the school officials and authorities of the State of Oklahoma in accordance with the laws of the State of Oklahoma. Counsel for the parties further agreed that plaintiffs, THURMAN BROWN, JR., BILLY DON BROWN, NORMA BELL BROWN and LONNELL THIERRY, are Negro minor children of school age residing within the said Morris Independent School District, and that said plaintiffs are not enrolled in and are not attending any school at this time. Counsel for the defendants stated that the said four plaintiffs may enroll in and attend the public schools of the Morris Independent School District on a non-segregated basis and without discrimination because of race or color when and if said plaintiffs will present themselves for enrollment as qualified for enrollment as students in said schools under the laws of the State of Oklahoma.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECLARED that the plaintiffs, THURMAN BROWN, JR., BILLY DON BROWN, NORMA BELL BROWN and LONNELL THIERRY, are entitled to and have the right to attend the public schools of the Morris Independent School District on the same basis and under the same circumstances as white students and without discrimination because of their race or color.

IT IS FURTHER ORDERED, ADJUDGED AND DECLARED that the right of the plaintiff minor children of school age within the said Morris Independent School District who have transferred to schools outside the geographic limits of the said School District, and the right of all other such Negro minor children similarly situated to attend public schools in said Morris Independent School District, is an administrative matter to be determined by the school officials of the State of Oklahoma in accordance with the laws of the State of Oklahoma without discrimination because of race or color.

It is the further judgment and decree of this Court that the injunctive relief sought by the plaintiffs should be and the same is hereby denied.

EDUCATION
Public Schools—Oklahoma

Mark E., Brenda J., and Grant W. SIMMS, Jr., minors, by their father and next friend, Grant W. Simms, Sr., et al. v. Roy HUDSON, as President, and R. B. Ross, as Secretary, of the Preston Independent School District No. 5, Okmulgee County, Oklahoma, a corporation, et al.

United States District Court, Eastern District, Oklahoma, November 14, 1957, Civ. No. 4246.

SUMMARY: Negro school children in Preston, Oklahoma, brought a class action in federal district court to require their admission to public schools without discrimination on the basis of race or color. At the hearing the school officials indicated their willingness to proceed with integration. The court entered a decree directing that integration be started at both the elementary and high school by September, 1958, and that the school officials file with the court by that time a plan for carrying out the decree.

RICE, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Minor plaintiffs are citizens of the State of Oklahoma; they live and reside in Okmulgee County, Oklahoma, and within the Preston Independent School District No. 5, and they are, each of them, members of the Negro race.

2. Minor plaintiffs are under the age of twenty-one years; they are of public school age and entitled to attend the public schools of the State of Oklahoma.

3. The defendants ROY HUDSON and R. B. ROSS are the duly elected, qualified and acting President and Secretary, respectively, of the defendant, Preston Independent School District of Okmulgee County, Oklahoma.

4. The plaintiffs, MARK E., BRENDA J., and GRANT W. SIMMS, are in all material respects eligible to attend the public schools within the Preston Independent School District.

5. On or about the 24th day of August, 1956, they made application to attend the schools within the defendant school district at the regular time of admission, and they were refused admission to the said schools solely because of their race and color.

6. The plaintiffs, BOBBY JEAN WILSON, CHESTER R. DEVILLE, BRENDA J. KELLEY, BERNARD and DWIGHT W. WILSON, MARTHA E. HOLMES, SARA HANE and WARNA JEAN WILSON, ARCHESTER and SILVESTER BORDERS are ineligible to attend the public schools within the Preston Independent School District of Okmulgee County, Oklahoma, by virtue of transfers executed by their respective parents transferring them to schools in other school districts of the State for the school year 1957-58.

[*Prior Policy*]

7. It has been the policy, custom and usage of the Board of Education of the Preston Independent School District of Okmulgee County, Oklahoma, in the past, to transfer all Negro children of high school age and grade out of the Preston Independent School District to school districts outside the defendant school district to receive their high school training.

8. That policy, custom and usage prevailed at the time of the filing of this action and at the time of trial.

9. The Preston Independent School District, approximately two years ago, built two new school buildings. The two school buildings are located in the Town of Preston on opposite sides of the street. At the present time, one of the buildings is used as a grade school for negro pupils. The other is used for white students, both grade and high school. The district operates no high school for negro children who live within the district.

10. The enrollment in the white grade school is approximately 100 and in the high school approximately 80. The enrollment in the negro school is approximately 50. Within the district, there are approximately 43 negroes of high school age. Two negro teachers teach the negro students in the grade school. There are four white teachers who teach the white students in the grade school and five teachers who teach in the high school.

[*Schools Crowded*]

11. At the present time, the school used for white students is filled to capacity, or approximately so. The policy of the school authorities as expressed at the time of trial is to make the change from segregated schools to integrated schools gradually by reason of the fact there is a rather high percentage of negro students in both grade and high school. A beginning was made by transporting white and colored students in the same buses.

12. Prior to decisions of the Supreme Court of the United States in Brown, et al. vs. Board of Education, 347 U.S. 483 and 349 U.S. 294, the laws of the State of Oklahoma provided for segregated schools. The entire school system of the state was set up on that basis. Negro teachers taught in the negro schools; white teachers taught in the white schools.

13. There is no problem presented at this time regarding the high school student. With the exception of the Simms children, all other high school students named in this action had,

prior to the hearing hereon, transferred to other districts for the present school year. At the conclusion of the hearing, the Court advised the school authorities that they must admit the Simms children, and it is my understanding that they have been admitted and are attending the school at this time.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter here in controversy.

2. The Preston Independent School District is a body corporate and an administrative agency of the State of Oklahoma. It is properly sued in its official name and capacity.

3. The defendants ROY HUDSON and R. B. ROSS are officers of the said corporation; they are agents of the State of Oklahoma and their official acts are the acts of the State of Oklahoma.

4. This action is properly brought by adult petitioners, who are the respective parents of plaintiffs, as next friends acting in behalf of their minor children, pursuant to Rule 17, Federal Rules of Civil Procedure.

5. This is an action cognizable by this Court as an action in the nature of a class action under Rule 23, Federal Rules of Civil Procedure.

6. The segregation of children in the public schools of the State of Oklahoma solely on the basis of their race, even though the physical facilities provided by the State for each race separately are equal, is a denial of equal educational opportunities, and such racial segregation deprives the segregated group of the equal protection of laws and is prohibited by the Federal Constitution. Brown v. Board of Education, 347 U.S. 483.

7. The Supreme Court in its two opinions, supra, recognized that the change from segregated to integrated schools presented problems relating to administration arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis. It is the responsibility of the school authorities to solve these problems.

[*Time Sought*]

8. The school authorities recognize the law as announced by the Supreme Court, but desire more time for solving the problems involved in operating a grade school on a completely nonracial basis. Although they are not in complete accord with the law as announced, there is not, in my opinion, any disposition to defy the law as announced by the Supreme Court. In the Court's opinion, a changeover from a completely segregated to a completely integrated system in the grade school in this district will, and should, require some additional time. For the purpose of giving the school board additional time in which to consider problems relating to administration and personnel, the Court will not order integration in the grade schools at the present time but will require that the board present plans evidencing good faith compliance with the law, prior to the beginning of the school term in 1958; and upon motion presented by the plaintiffs, the Court will consider said plans and enter such order as it deems appropriate at that time.

9. As to the high school, appropriate order should be prepared directing the school district to admit on application for enrollment qualified negro high school students.

This cause is continued until the 14th day of November, 1957. The attorney for the plaintiff is requested to prepare a decree in conformity with the foregoing findings of fact and conclusions of law and present same to the Court for entry at Muskogee, Oklahoma, on the said 14th day of November, at 9:30 a.m.

Dated this the 5th day of November, 1957.

ORDER, JUDGMENT AND DECREE

The above styled and numbered cause having come to trial on the 21st day of September, 1957, before the Court sitting without a jury, and the plaintiffs being present in Court with counsel and the defendants being present in Court with their counsel, and all parties having announced ready for trial in open court, and the Court having been fully informed on the pleadings filed herein, and having heard the testimony of the witnesses called to testify, and the argument of counsel for the parties, the Court is now of the opinion that as to the high school operated and maintained by the defendant Preston Independ-

ent School District No. 5, Okmulgee County, Oklahoma, a corporation, an appropriate order should be entered directing the defendants ROY HUDSON, as President, and R. B. ROSS, as Secretary of the said defendant school district, to admit on application for enrollment all qualified Negro high school students; and that as to the elementary schools operated and maintained by the said defendant Preston Independent School District No. 5, Okmulgee County, Oklahoma, a corporation, the Court is of the opinion that the said defendants ROY HUDSON, as President, and R. B. ROSS, as Secretary, of the said defendant school district, will be required to present to the Court their plans evidencing good faith compliance with the law, prior to the beginning of the school term to begin in September, 1958, and upon motion presented by plaintiffs in this cause, the Court will consider said plan and enter such order or orders with respect thereto, as the Court may deem appropriate at that time.

IT IS THEREFORE THE ORDER, JUDGMENT and DECREE of the Court that the defendants ROY HUDSON, as President, and R. B. ROSS, as Secretary of the defendant Preston Independent School District No. 5, Okmulgee County, Oklahoma, a corporation, their agents, servants, employees, their attorneys, and all others in concert or participation with them who shall receive notice of this ORDER, JUDGMENT and DECREE be, and they are hereby ORDERED and DIRECTED by the Court to admit on application for enrollment all qualified Negro high school students to the public high schools operated and maintained by the said defendants on the same terms and conditions as all other high school students are admitted without any distinctions being made as to Negro applicants on the basis or classification of their race or color.

IT IS THE FURTHER ORDER, JUDGMENT and DECREE of the Court that the defendants ROY HUDSON, as President, and R. B. ROSS, as Secretary of the defendant Preston Independent School District No. 5, Okmulgee County, Oklahoma, a corporation, their agents, servants, employees, their attorneys, and all others in concert or participation with them who shall receive notice of this ORDER, JUDGMENT and DECREE be, and they are hereby ORDERED and DIRECTED by the Court to present plans evidencing good faith compliance with the law, prior to the beginning of the school term to begin in September, 1958, in the operation, maintenance and management of the public elementary schools under their supervision and control.

IT IS THE FINAL ORDER, JUDGMENT and DECREE of the Court, that the Court will retain jurisdiction of this cause and upon motion presented by the plaintiffs after defendants have presented their plan for compliance with the law to the Court, that the Court will then consider said plan and make and enter such ORDER or ORDERS in the premises as the exigencies of the cause may then demand.

Dated this the 14th day of November, 1957.

EDUCATION
Public Schools—Tennessee

Robert W. KELLEY, et al. v. BOARD OF EDUCATION OF THE CITY OF NASHVILLE, Davidson County, Tennessee, et al.

United States District Court, Middle District, Tennessee, December 6, 1957, Civ. No. 2094.

SUMMARY: White and Negro patrons of public schools in Nashville, Tennessee, filed an action in federal district court seeking to require the city Board of Education to admit children to public schools in the city without regard to race or color. A motion to constitute a three-judge court was granted. The court determined that it did not have jurisdiction, the invalidity of Tennessee constitutional and statutory provisions requiring racially separate schools being conceded by the defendants, and remanded the case to a single judge court. The court further found that the Board was proceeding in good faith toward eliminating segregation in the schools and granted a continuance to the next term of court. 139 F.Supp. 578,

1 Race Rel. L. Rep. 519 (1956). Later a motion to intervene in the case by members of the Tennessee Federation for Constitutional Government was denied by the court. 1 Race Rel. L. Rep. 1042 (1956). On October 29, 1956, the Board adopted a plan providing for the elimination of compulsory segregation in the first grade, beginning with the 1957-58 school year, with a limited right of transfer on the basis of the racial composition of the school attended and setting a date for further consideration of the time and extent of additional integration. 1 Race Rel. L. Rep. 1120. This plan was submitted to the court on further hearing of the action for an injunction. The court approved the plan in part as being a prompt and reasonable start toward complete integration but directed the board to submit, before December 31, 1957, "a report setting forth a complete plan to abolish segregation in all of the remaining grades of the city school system, including a time schedule therefor." 2 Race Rel. L. Rep. 21 (1957). Just prior to the commencement of the 1957 school term the board, because of a petition filed with it by several citizens, moved to file a supplemental answer in order to ascertain its authority under, and the validity of, recent Tennessee legislation. The legislation (Chapter 11, Tennessee Public Acts, 1957, 2 Race Rel. L. Rep. 215) authorizes boards of education to provide separate schools for white and Negro children whose parents or guardians elect that they attend such schools. After hearing the court denied the motion, holding the act to be, on its face, antagonistic to the constitutional principles announced in the *School Segregation Cases*. 2 Race Rel. L. Rep. 970 (1957). In accordance with the court's prior order, the Board of Education filed with the court on December 6, 1957, a plan which would authorize the assignment of pupils to one of three categories of schools on a racially segregated or non-segregated basis in accordance with the preference of the parent or guardian. The plan, referred to as the "Parent's Preference Plan," is set out below. The court disapproved the plan on February 18. This opinion will be published in the April, 1958, issue of Race Relations Law Reporter.

REPORT OF NASHVILLE
BOARD OF EDUCATION

Pursuant to order of this Court in the above case, entered on February 20, 1957, which is recorded upon the minutes of the Court, in Vol. 19, pages 785-786, the Board of Education submits this report setting forth a complete plan to abolish segregation in all grades of the City School System.

The Plan is included in a Report of the Instruction Committee to the Nashville Board of Education, which Report was approved and adopted by the Board of Education at a meeting held on December 4, 1957. Said Report and Plan are as follows:

"Re: *Report of Instruction Committee on Abolishing Compulsory Segregation in the Public Schools*

Ladies and Gentlemen:

The Board of Education has heretofore referred to the Instruction Committee for study and recommendation the subject of racial discrimination in public education and all matters relating thereto. In the case of 'Kelley vs. Board of Education' the Federal Court in Nashville has ordered that the Board 'shall submit to the Court not later than December 31, 1957 a report setting forth a complete plan to abolish segregation in all of the remaining grades of the city school system, including a time schedule therefor'. Accordingly, your Committee has been charged with the responsibility, after study, of making recommendation to the Board with respect to its compliance with the Court order. Your Committee has made a serious and conscientious effort to recommend a plan which would be approved as constitutional and at the same time would be acceptable to public sentiment of the majority of people in Nashville, without which an effective public school system cannot be maintained.

The Instruction Committee has held numerous meetings at which it has discussed the matter, reviewed much material on the subject, and more recently weighed the implication of the events in Nashville during the Fall of 1957. In addition to such meetings, the individual members of this Committee have conferred with many parents of the students and with other interested citizens. These meetings and conferences have convinced the members of your Committee

that an overwhelming majority of the people of Nashville are deeply and conscientiously opposed to compulsory integration. A plan in accordance with the desires of such majority has been formulated and is being urged for adoption by a group known as the 'Parents Preference Committee'. The Instruction Committee has, therefore, concluded to recommend that the Board adopt the plan requested and urged by the Parents Preference Committee. To accomplish this end, your Committee proposes adoption by the Board of Education of the following resolution:

BE IT RESOLVED that the Board of Education now adopt and submit to the United States District Court at Nashville the following plan to comply with the decision of the Supreme Court of the United States in the case of Brown v. Board of Education, said plan to be effective for all twelve grades for the school year beginning in September 1958:

PLAN

1. No compulsory integration or segregation shall be required in any grade of the Nashville Public School System.
2. There shall be conducted annually a parents preference census to determine which parents desire their children to attend school with members of their own race exclusively and which parents desire that their children attend school with the members of another race. Such preference shall be stated by parents or those standing in the position of parents, and if no preference is indicated the child shall be assigned by the Board under rules in conformity with this plan.
3. Three groups of schools of equal standards, opportunity and facilities in accordance with the preferences indicated above shall be established in as nearly accessible and convenient locations as practicable:
   a. Schools for Negro students whose parents prefer that their children attend school with members of their own race exclusively;
   b. Schools for White students whose parents prefer that their children attend school with members of their own race exclusively;
   c. Integrated schools for those students whose parents prefer that their children attend schools available to both Negro and White children.
4. Requests by parents for transfer of their children from one school to another shall be acted upon by the Board in accordance with existing laws.
5. All administrative details and procedures for the operation of this plan within the framework thereof shall be determined by the Superintendent of Nashville City Schools under the direction of this Board.

BE IT FURTHER RESOLVED that if objections be filed with the United States District Court to said plan, attorneys for the Board of Education be authorized to invite attorneys for the Parents Preference Committee and also the Attorney General of Tennessee to appear in Court as amici curiae and to participate in the hearing by brief and oral argument in support of the foregoing plan.

NASHVILLE BOARD OF EDUCATION

By /s/ Reber Boult
/s/ Edwin F. Hunt
Attorneys

EDUCATION
Public Schools—Texas

Dr. Edwin L. RIPPY, as President of the Board of Trustees of the Dallas Independent School District et al. v. Hilda Ruth BORDERS, a minor, by her father and next friend, Louis Borders, Jr., et al.

United States Court of Appeals, Fifth Circuit, December 27, 1957, No. 16934.

SUMMARY: In a class action, Negro school children in Dallas County, Texas, sought a declaration of rights and injunctive relief in a federal district court with respect to their admis-

sion to public schools in that county on a nonsegregated basis. The district court refused a motion to convene a three-judge district court, found that the public school facilities furnished for white children and Negroes were substantially equal, and held that the United States Supreme Court's implementation decision in the *School Segregation Cases* required that integration be accomplished on the basis of planning to be done by the school officials and the lower courts. The district court further found that no such plan then existed and dismissed the suit without prejudice. *Bell v. Rippy*, 133 F.Supp. 811, 1 Race Rel. L. Rep. 318 (N.D. Tex. 1955). On appeal, the Court of Appeals, Fifth Circuit, one judge dissenting, held that there was no basis in the evidence nor in law for the action taken by the district court and vacated, reversed and remanded the case. *Brown v. Rippy*, 233 F.2d 796, 1 Race Rel. L. Rep. 649 (1956). On the remand the district court, indicating that it would be a "civil wrong" to white pupils to admit Negroes to already crowded white schools, declined to issue an injunction and dismissed the case "in order that the school board may have ample time . . . to work out this problem." *Bell v. Rippy*, 146 F.Supp. 485, 2 Race Rel. L. Rep. 32 (N.D. Tex. 1956). The plaintiffs again appealed to the Court of Appeals for the Fifth Circuit from this dismissal. The Court of Appeals reversed the dismissal and remanded the case to the district court with directions to enter a decree requiring the school officials to desegregate the schools "with all deliberate speed." The court stated that administrative remedies available to the plaintiffs had, in effect, been exhausted by the refusal of the school officials to admit them to the requested schools and they were not required to pursue further a futile remedy. 247 F.2d 268, 2 Race Rel. L. Rep. 805 (1957). On petition to the Court of Appeals for rehearing it was contended that recent Texas legislation (2 Race Rel. L. Rep. 695), which would debar a school district from receiving state funds if it was integrated without first obtaining an affirmative vote in an election held for that purpose, would result in large losses to the district if it complied with the court order. The Court of Appeals denied the petition for rehearing, stating that the legislation could not operate to relieve either federal or state officials of their duty to uphold the United States Constitution. 2 Race Rel. L. Rep. 984 (1957). On the remand order of the Court of Appeals, the district court issued an order requiring the integration of the Dallas schools to be commenced at the mid-winter term (January, 1958). 2 Race Rel. L. Rep. 985 1957). The defendants then appealed this order to the Court of Appeals for the Fifth Circuit. The Court of Appeals reversed the judgment and remanded the case with directions to the district court to enter an order in compliance with its prior opinion and to retain jurisdiction of the case to supervise the carrying out of the order. The court observed that, under the prior mandate, "school authorities should be accorded a reasonable further opportunity promptly to meet their primary responsibility."

Before RIVES, JONES and BROWN, Circuit Judges.

RIVES, Circuit Judge.

Upon the last appeal, this Court reversed the judgment of the district court dismissing the complaint and directed the entry of a judgment restraining and enjoining the defendants from requiring segregation of the races in any school under their supervision from and after such time as might be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision in Brown v. Board of Education of Topeka, 349 U.S. 294, and further directed the district court to retain jurisdiction of the cause for such further hearings and proceedings and the entry of such orders and judgments as might be necessary or appropriate to require compliance with such judgment.[1] Borders v. Rippy, 5th Cir. 1957, 247 F.2d 268.

1. In pertinent part the mandate of this Court read:
"ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court is reversed and the cause is remanded with directions to the District Court to enter judgment restraining and enjoining the defendants, Board of Trustees of the Dallas Independent School District, Dallas County, Texas, and the President and members thereof, together with the other defendants in this case, their and each of their agents, servants, employees and successors in office and those in concert with them who shall receive notice of such judgment, from requiring segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with

[*Statement of Trial Court*]

After he had received the opinion of this Court, but before our mandate had issued, the District Judge called counsel before him and made a statement "as to his determination", in part as follows:

> "This Court is now called upon to issue an order in accordance with the Circuit Court's decisions and directions. That order not only unsettles the tranquility of the Dallas Public Schools which has heretofore existed in a proud form for many years under which both the colored and the white pupils have had equal school facilities and splendid teachers, but it also takes from the Independent School District a large necessary amount of State funds if and when desegregation is ordered.
>
> "It is difficult, gentlemen, for me to approve this order, but this is a land of the law and it is my duty to do what I am ordered to do by the higher Court, and I therefore ask you gentlemen of counsel to prepare an order in accordance with the ruling of the United States Circuit Court of Appeals for this Circuit, as outlined in its opinion upon the original case and upon the motion for rehearing, and I should like to have you gentlemen of counsel to prepare the order to be approved by each of you as to form, ordering integration to be permitted at the coming mid-winter term of the schools and not before that time. Let your order contain the practical portion of the School Board's division of districts and institution of schools."

Without any further hearing, without any evidence other than that appearing in the record which led to our reversal, and without inviting suggestions or arguments from counsel on anything save as scriveners in the drafting of an order to effectuate his prior determinations, the District Judge thus picked the mid-winter school term of 1957-1958 as the time to start system-wide desegregation.

all deliberate speed as required by the decision of the Supreme Court of the United States in Brown v. Board of Education of Topeka, 349 U.S. 294, and retaining jurisdiction of the cause for such further hearings and proceedings and in the entry of such orders and judgments as may be necessary or appropriate to require compliance with such judgment."

[*"Requiring" vs. "Permitting"*]

After our mandate had been received, but still without any further hearing, and professedly upon the decision and order of this Court and the record theretofore made in the cause, the District Judge restrained and enjoined the defendants "from requiring *or permitting segregation of the races* in any school under their supervision, beginning and not before the mid-Winter school term of 1957-1958" (Emphasis ours).

Upon the same record, the District Judge had theretofore expressed his opinion that: "I think that the testimony shows completely that the school authorities here in charge of this Independent School District are certainly doing their very best to comply with the ruling of the Supreme Court of the United States." This Court in turn had said that: "We do not impugn the good faith of the Board, of the Superintendent, or of any of the school authorities." (247 F.2d 268, 272).[2]

We have emphasized the words "*or permitting segregation of the races*" in the district court's order because that expression might indicate a serious misconception of the applicable law and of the mandate of this Court. Our mandate (footnote 1, supra) had been carefully limited so as to direct the entry of a judgment restraining

2. The District Judge has sent to the Clerk of this Court a copy of his letter to appellants' counsel, the body of which reads as follows:

> "I thank you for the copy of the brief which you have filed with the Circuit Court of Appeals in re Rippy et al. v. Borders et al.
>
> "It is somewhat surprising to me that you continue to contend that the court made a 'judicial guess' in fixing the mid-winter term as the time for integration.
>
> "I asked both you and counsel for the other side, when the mandate was received from the Circuit Court of Appeals, to prepare an order, and some little discussion followed, and then you being unable to agree upon an order I fixed the order and the time because the court ordered me to see that integration took place at 'deliberate speed.'
>
> "I had heard testimony several times which told of the number of students, both white and colored, and knew the number of the plaintiffs who were called—27, and I thought that five months was ample time and would be in accordance with the order of the Circuit Court."

While that letter reflects an attitude of the District Judge not shown in his two statements which have been quoted, it can hardly serve to change the record before this Court. Further, by its reference to twenty-seven plaintiffs, it apparently ignores the fact that this is a class action in which the district court has ordered en masse desegregation having no relation to the number of named plaintiffs.

and enjoining the defendants "from *requiring segregation of the races* in any school under their supervision" (emphasis supplied). Likewise in our opinion, we had pointed out that it is only *racially discriminatory* segregation in the public schools which is forbidden by the Constitution.[3] That point was emphasized in the Arlington, Virginia Case[4] in which Chief Judge Parker of the Fourth Circuit quoted with approval the apt language of District Judge Bryan:

> "'It must be remembered that the decisions of the Supreme Court of the United States in Brown v. Board of Education, 1954 and 1955, 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873] and 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083] do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of the Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate.'"

School Board of City of Charlottesville, Va., v. Allen, 4th Cir. 1956, 240 F.2d 59, 62.

[*Duty of Court*]

In our opinion on the last appeal, we noted that the then appellants prayed for no more stringent order than one "requiring appellees to desegregate the schools under their jurisdiction 'with all deliberate speed'" (247 F.2d 272). Accordingly, this Court's mandate fixed no date for desegregation more specific than "from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision in Brown v. Board of Education of Topeka, 349 U.S. 294." (Footnote 1, supra.) The authority to administer the public schools is vested in the appellants, the Board and the Superintendent, and, of course, they are the ones required to make the necessary arrangements referred to in the judgment to be entered by the district court as directed by our mandate. If the school authorities fail promptly to meet their primary responsibility to the satisfaction of the plaintiffs, appellees, and others similarly situated, then the duty will devolve upon the district court to hold a hearing to decide whether they have done so and, if necessary, to proceed further so as actually and effectively to require compliance. In the performance of that duty, the district court must exercise *its own* judgment and discretion in accordance with the applicable principles of law set forth in Brown v. Board of Education of Topeka, supra. It seems to us that the district court did not do this in entering the judgment appealed from, but apparently considered itself bound to enter that judgment by the mandate of this court. That was not in accord with the mandate nor with the order of responsibility (first the school authorities, then the local district court, and lastly the appellate courts) prescribed in Brown v. Board of Education of Topeka, supra:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." (349 U.S. at p. 299.)

3. "The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color." Borders v. Rippy, 247 F.2d 268, 271.
4. Thompson v. County School Board of Arlington County, E.D. Va., 1956, 144 F.Supp. 239, 240, affirmed 4th Cir. 1956, 240 F.2d 59, 62.

[*Time Allowed*]

We thought, and still think, that this Court's mandate made it clear that before a more specific date should be fixed and before any orders or judgments should be entered to require compliance with the judgment directed in that mandate, the school authorities should be accorded a reasonable further opportunity promptly to meet their primary responsibility in the premises, and then if the plaintiffs, or others similarly situated, should claim that the school authorities have failed in any respect to perform their duty, there should be a full and fair hearing in which evidence may be offered by any and all parties, and further that the Court should retain jurisdiction to require compliance with its judgment.

The judgment of the district court is therefore reversed and the cause remanded with directions to enter a judgment in accordance with the mandate of this Court issued on September 7, 1957 and in accordance with this opinion, and to retain jurisdiction for such further hearings and proceedings and the entry of such orders and judgments as may be necessary or appropriate to require compliance with such judgment. In view of the reversal on appeal, the petition for mandamus is not necessary and leave to file said petition is denied.

REVERSED WITH DIRECTIONS. LEAVE TO FILE PETITION FOR MANDAMUS DENIED.

EDUCATION
Public Schools—Virginia

Theodore Thomas DeFEBIO, an infant, et al. v. the COUNTY SCHOOL BOARD OF FAIRFAX COUNTY, et al.

Supreme Court of Appeals of Virginia, December 2, 1957, 100 S.E. 2d 760 (1957).

SUMMARY: The white mother of school-age children in Fairfax County, Virginia, brought a petition for a writ of mandamus in the Virginia Supreme Court of Appeals to require county school officials to readmit her children to public schools in the county without requiring the filing of an "application for placement of pupil" (see 2 Race Rel. L. Rep. 1042). Upon establishing residence in the county, the children had been provisionally admitted to schools but were excluded when the mother refused to file the form required by the state Pupil Placement Act (see 1 Race Rel. L. Rep. 1109). The petition contended the Pupil Placement Act to be unconstitutional under both the state and federal constitutions. The court refused to grant the petition, holding that the act was within the constitutional powers of the state legislature and that the plaintiffs did not allege that the act deprived them of the equal protection of the laws guaranteed by the Fourteenth Amendment and thus had no standing to challenge the act on that ground. [Compare *Adkins v. School Board of Newport News*, 2 Race Rel. L. Rep. 46 (D.C. E.D. Va. 1957); and *Calloway v. Farley*, 2 Race Rel. L. Rep. 1121 (D.C. E.D. Va. 1957)].

HUDGINS, Chief Justice.

PETITION FOR WRIT OF MANDAMUS

On January 19, 1957, Theo T. DeFebio and her two children, Theodore Thomas DeFebio, 14 years of age, and Dominick Nicholas DeFebio, 9 years of age, became residents of Fairfax County, Virginia. Subsequently, on the request of the mother, her two sons were permitted by local school authorities to attend, on a temporary basis subject to being officially assigned by the Pupil Placement Board, public schools in Fairfax county. The older son was admitted to the Mount Vernon High School and the other son to the Hollin Hall Elementary School. Despite repeated requests made by the school authorities, Mrs. DeFebio refused to execute and file for her sons "application for placement of pupil" forms as required by Chapter 70, Acts of

Assembly, Extra Session (1956), Code, §§ 22-232.1, et seq. Because of this refusal permission for the two children to attend the named schools was withdrawn.

Thereafter, Mrs. DeFebio and her two sons filed in this Court a petition for a writ of mandamus praying that the County School Board of Fairfax County, the Division Superintendent of Schools of Fairfax County, the Principals of Mount Vernon High School and Hollin Hall Elementary School of Fairfax County, the President and Members of the State Board of Education and the Superintendent of Public Instruction be compelled to reinstate the two children in the schools, notwithstanding Mrs. DeFebio's refusal to execute the application for placement of pupil.

[*State Constitution*]

Petitioners contend that § 133 of the Virginia Constitution vests the power of enrollment or placement of pupils in public schools exclusively in local school boards, and that the legislature is thereby prohibited from vesting such power in the Pupil Placement Board or any other body.

The legislature functions under no grant of power. It is the supreme law making body of the Commonwealth, and has the inherent power to enact any law not in conflict with, or prohibited by, the State or Federal Constitutions. Section 133 of the Virginia Constitution, while vesting "supervision" of public schools in local school boards, does not define the powers and duties involved in that supervision. The general power to supervise does not necessarily include the right to designate the individuals over whom supervision is to be exercised. If the legislature deems it advisable to vest the power of enrollment or placement of pupils in an authority other than the local school boards, it may do so without depriving such local school boards of any express or implied constitutional power of supervision.

[*Fourteenth Amendment*]

Petitioners' second contention is that their rights under the Fourteenth Amendment to the Constitution of the United States are infringed by the requirement that the parent execute and file the application for placement of pupil forms. In support of this contention, they cite numerous federal cases on integration of public schools, including Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R. 2d 1180, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; Atkins v. School Board of Newport News, 148 F.Supp. 430, aff'd, 4 Cir., ____F.2d____, cert. den., ____U. S.____, ____S.Ct.____, ____L.Ed.____.

None of these authorities is relevant to, or determinative of, the issue presented by the facts in this case. Petitioners are members of the Caucasian race, and the mother desires her children to attend schools in which only the members of that race are enrolled. The issue here is quite narrow. It involves no broad constitutional question of racial discrimination. The only issue presented is whether, as a prerequisite to the admission of her children to the public schools, Mrs. DeFebio may be required to execute an application in which the only information sought is: (1) Name, address, date of birth, sex, condition of health, physical or mental disabilities, and particular aptitudes of the child; (2) name and address of school the child last attended, his grade and years in school, and (3) name and location of any school in Virginia in which any other child of applicant is enrolled.

[*No Violation of Rights*]

There is nothing in such requirement that violates any of petitioners' constitutional or other legal rights. Indeed, the information sought could have been required by the school authorities without a specific act of the General Assembly. There is nothing in the record tending to show that the enforcement of the statute as to the petitioners will result in the children being denied admission to any school which they may be entitled to attend, or that they will thereby be required to attend any school to which they should not be admitted.

It is a fundamental principle of constitutional law, firmly supported by both Federal and State authorities, that a person who challenges the constitutionality of a state statute has the burden of proving that he himself has been injured or is threatened with injury by its enforcement. In

other words, a person whose rights are not infringed by enforcement of a state statute can not successfully attack its constitutionality. It avails him nothing to point out that some other person might conceivably be discriminated against. "One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." Premier-Pabst Sales Co. v. Grosscup, 298 U.S. 226, 227, 56 S.Ct. 754, 755, 80 L.Ed. 1155; Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586; Morgan v. Commonwealth, 168 Va. 731, 191 S.E. 791, 111 A.L.R. 62; Grosso v. Commonwealth, 177 Va. 830, 13 S.E.2d 285; Bailey v. Anderson, 182 Va. 70, 27 S.E.2d 914; Avery v. Beale, 195 Va. 690, 80 S.E.2d 584; 11 Am. Jur., Constitutional Law, § 111 et seq., p. 748 et seq.; 16 C.J.S., Constitutional Law, § 76 et seq., p. 226 et seq.

For the reasons stated the writ of mandamus must be denied.

Writ denied.

GOVERNMENTAL FACILITIES
Golf Courses—Florida

City of FORT LAUDERDALE v. Joseph H. MOORHEAD et al.

United States Court of Appeals, Fifth Circuit, November 1, 1957, 248 F.2d 544.

SUMMARY: Negroes in Fort Lauderdale, Florida, applied for permission to use the municipal golf course. Upon the denial of their application by the city authorities they instituted an action in federal district court asking for an injunction to require their admission to the golf course without regard to race or color. After hearing the court issued a permanent injunction against the city authorities. The court stated that possible financial loss to the city was no basis for denying constitutional rights and ordered the admission of Negroes to the city golf course on the same basis as white persons. 152 F.Supp. 131, 2 Race Rel. L. Rep. 409 (S.D. Fla. 1957). On appeal the Court of Appeals, Fifth Circuit, affirmed.

Before RIVES, TUTTLE and BROWN, Circuit Judges.

PER CURIAM.

The claimed procedural errors we find too unsubstantial to warrant discussion. The findings of fact are full and complete and the conclusions of law are amply supported by the authorities cited. We agree with the learned district court. The judgment, 152 F.Supp. 131, is therefore

Affirmed.

GOVERNMENTAL FACILITIES
Police Boys Clubs—District of Columbia

Welker C. MITCHELL, an infant, by Margaret U. Mitchell, mother and next friend, et al. v. BOYS CLUB OF METROPOLITAN POLICE, D. C., a corporation, et al.

United States District Court, District of Columbia, November 27, 1957, 157 F. Supp. 101.

SUMMARY: A Negro boy brought an action in the federal district court for the District of Columbia against the District of Columbia Police Boys Club and members of the Board of Commissioners of the District. The action sought admission to a Boys Club on a racially non-segregated basis or, in the alternative, an injunction against contributions by the District of Columbia to the Boys Club. The plaintiff maintained that contributions of buildings and personnel to the Boys Club constituted the Club an agency of the District of Columbia so that a policy of racial segregation in operating the Club was in violation of the Fifth Amend-

ment. The court found that, although the District of Columbia furnishes some building space without rent to the Club and assigns some police officers to assist in the Club's operation, there is no control over the Club by the municipal government. Stating that "[i]f each time a government lends its assistance to a private institution it were to acquire that institution as an arm of government, then government would become a many armed thing," the court dismissed the complaint.

MATTHEWS, District, Judge.

Welker C. Mitchell, a colored youth, by his mother, Margaret U. Mitchell, brought this suit for himself and on behalf of others similarly situated. The defendants are the Boys Club of Metropolitan Police, D. C., a corporation, and Robert E. McLaughlin and Alvin C. Welling who are sued in their official capacity as members of the Board of Commissioners of the District of Columbia. David B. Karrick, the remaining member of the three member Board of Commissioners of said District, is not a party to this suit, his substitution for his predecessor in office not having been made as provided by Rule 25(d) of the Federal Rules of Civil Procedure.

[*Relief Sought*]

The plaintiff seeks to have the Court (1) declare the club corporation an agency of the District of Columbia Government, (2) enjoin the club corporation from denying membership in any of its clubs to plaintiff and other boys solely because of their color, (3) compel the acceptance of plaintiff's application for admission to Club Number Five now maintained for white boys, and (4) in the alternative (if plaintiff is not entitled to the above relief), enjoin the said Board of Commissioners from contributing to the club corporation any of the property, facilities, personnel or services of the District of Columbia so long as the club corporation operates racially segregated clubs.

It is conceded that the plaintiff was denied admission to Club Number Five solely because of his color pursuant to the uniform policy of the club corporation to maintain racially segregated clubs. Upon his premise that the club corporation is an agency of the District of Columbia Government the plaintiff contends that the denial of his admission constitutes an arbitrary deprivation of his liberty by the municipality itself in violation of the Fifth Amendment to the Constitution. The defendants deny that the club corporation is an agency of the District of Columbia Government. They deny that any constitutional right secured to the plaintiff is being infringed. Their position is that the club corporation is a private charitable organization, and therefore that its practice of racial segregation in its clubs is *private* action which is not forbidden by the Fifth Amendment.

[*Question Presented*]

The question presented here is whether the club corporation is an agency of the District of Columbia Government. In other words, the issue is whether the racial segregation about which plaintiff complains is public action or private action. If it is public action, then it violates the Fifth Amendment. Bolling v. Sharpe, 347 U. S. 497. On the other hand, if it is private action it is lawful and does not offend the guarantees of the Fifth Amendment. National Federation of Ry. Workers v. National M. Board, 110 F.2d 529, 71 U. S. App. D. C. 266, certiorari denied, 310 U. S. 628.

The nature of corporations is discussed in the landmark case of Dartmouth College v. Woodward, 5 Wheat. (17 U.S. 517, 669, 671), in part, as follows:

> "Public corporations are generally esteemed such as exist for public * * * purposes only, such as towns, cities, parishes and counties; * * * strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under charter of the government, the corporation is private, however extensive the uses may be to which it is devoted * * *
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> * * *
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> "When the corporation is said, at the bar, to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the

public interests, to regulate, control and direct the corporation, and its funds and franchises, at its own good will and pleasure. Now, such an authority does not exist in the government, except where the corporation is in the strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself."

[*Privately Organized*]

It is undisputed that the club corporation was organized as a private institution. No claim is made that it has consented to being turned into a public corporation or that Congress has passed legislation purporting to accomplish such a transformation. What the plaintiff argues is that the corporation's operations and finances have become so dependent upon and "involved and enmeshed" with the District of Columbia that it now constitutes a de facto arm or agency of the municipal government. He grounds this theory on the fact that police officers aid the club corporation in its activities and participate in its fund raising campaigns and that it is permitted free use of certain property and facilities belonging to the District of Columbia.

An evaluation of the claim of the plaintiff depends upon the surrounding circumstances. Therefore the circumstances in this case will now be reviewed.

When the plaintiff was ten years old he applied for and was admitted to membership in a club operated by the club corporation for colored boys at 1200 U Street, N. W. Deciding after about six months that he no longer wanted to be a member he ceased to be one. Five years later while still living in Northwest Washington he presented himself, with an executed application of membership, to Club Number Five in Southeast Washington which is located in an abandoned fire house owned by the District of Columbia. Membership in that club for white boys being refused, plaintiff filed this action.

[*Founding of Club*]

The club corporation was organized in 1934 under the laws for the District of Columbia as a private charitable organization, the incorporators being three civilians and one police official who is called the Founder.

The aims of the club corporation are to develop correct speech, beneficial sports and clean habits among the boys of Washington, to cooperate with all recognized agencies in their work for the development of good citizenship in Washington, to teach boys the fundamentals of law observances, by a proper direction of recreational activities to lessen juvenile delinquency, and to create an interest among the citizens of Washington in their responsibilities to youth.

A boy may become a member of a club without cost to him or his parents in the way of fees, dues or assessments, all expenses being borne by the club corporation.

In the twenty-three years the club corporation has existed its clubs have ranged in size from one club with 200 boys to nine clubs with a membership of approximately 22,000 of which over 13,000 are colored boys while the balance of over 8,000 are white boys. The programs within each club are divided into five parts: social, athletic, crafts, recreational and educational. In addition to its clubs the club corporation maintains two summer camps in Maryland on properties in its ownership.

[*Control of Club*]

The management and control of all affairs of the club corporation are in a Board of Directors comprised of 179 men who are public spirited citizens of the District of Columbia. Over two-thirds are private citizens while the remainder are active or retired police officers. Two of the 179 members of the Board of Directors need not be elected, these being respectively, the Founder and the Chief of Police. The remaining 177 directors are divided into three groups of 59 each, the term of each group being three years, and members thereof fill vacancies by electing new members at the annual meeting.

The principal officers of the club corporation are President, First Vice-President, Second Vice-President, Comptroller, Treasurer, Assistant Treasurer, Secretary, Assistant Secretary and General Counsel. All are civilians, none being police officers. Exercising the administrative duties of the Board of Directors during the intervals between its meetings is an Executive Committee consisting of the above listed officers, the Chairmen of Standing Committees, Past Presidents who are members of said Board, the

Founder and the Chief of Police and their predecessors in office who are members of said Board. The Executive Committee is not empowered to make major changes or decisions as to policy or to authorize any major expenditures. The civilian members of the Executive Committee are greatly in excess of a majority.

Besides the above described officers the bylaws mention the following: Executive Secretary, Director, Office Manager and Supervisor of Clubs. These posts are all filled by civilians paid by the club corporation except that of Director which is held by a Police Captain, hereafter called the Captain. Unlike the officers of the club corporation, the holders of the above posts are not designated under the bylaws as members of the Executive Committee but they may be elected to the Board of Directors by that Board in which event they have no right to vote or hold office. However, no such election has been shown. So holding the post of Director is not the same as being a Director on the Board.

[*Secretary's Duties*]

Subject to the approval of the Board of Directors the civilian Executive Secretary formulates all club programs and activities, and sets the budget for each club. He is in charge of the hiring and discharge of personnel. He is responsible to and carries out the orders of the Board of Directors and all employees are subject to his direction.

The Captain is Chief of the Boys' Activity Bureau of the Youth Aid Division of the Metropolitan Police Department and he has been assigned by his superiors to duties with the club corporation. Insofar as matters of the club corporation are concerned he serves under its civilian Executive Secretary. He coordinates the clubs and deals with routine administrative details pertaining to their operation, each club being under a civilian supervisor who directs daily club activities. The Captain also makes recommendations to the Executive Secretary and the Board of Directors.

In all the club corporation has over 200 employees. Some are employed only during the summer camp season while more than 100 are full time employees.

No governmental funds are received by the club corporation. Its income has been and still is entirely from dues, contributions, legacies, gifts, rents, dividends, and interest. The net worth of the club corporation at the end of 1956 was $812,000 and during the period 1935 through 1956 the club corporation spent $3,459,-500 of its income on its program. The obligations of the club corporation are paid from funds owned solely by the corporation and under the control of its civilian officers.

[*D. C. Facilities Furnished*]

Two of the nine clubs here involved are at locations having no club houses and hence there are in all seven "club houses" exclusive of the summer camps. Three club houses are owned outright by the club corporation, one is rented by it from private individuals, and three are operated in properties owned by the District of Columbia. These three properties consist of two abandoned buildings—a school house and a fire house—and a two-room sub-basement of a police station. Water, heat and light are furnished by the District of Columbia for the sub-basement but the club corporation pays for repairs, light, heat, electricity and every other maintenance expense for the school house and fire house. The club corporation pays no rent as such but for improving these properties has expended over $75,000. The club corporation also uses two rooms in the District of Columbia Municipal Center as an administrative office, and at that location heat, light and local telephone service are furnished by the District of Columbia, but most of the furnishings and equipment in said office belongs to the club corporation, and it furnishes supplies.

In the area in the District of Columbia Municipal Center used as the administrative office of the club corporation the Executive Secretary and the Director (the Captain) have offices. The Executive Secretary is employed on a part time basis and is not at the administrative office daily but is there at intervals and is constantly available by telephone to give advice and directions. Besides the Executive Secretary and the Director (the Captain) five employees of the club corporation are regularly stationed at the administrative office—an office manager, three clerical workers and a driver.

[*Police Officers Assigned*]

In addition to the Captain nine uniformed policemen are assigned to special duty with the

clubs. The clubs are grouped into two divisions, and one club may play another in an athletic contest within a division. Two policemen act as club coordinators under the Captain, one for each of the two divisions. The other seven policemen are assigned to the individual club houses. These policemen are subject to performance of regular duties as well as to call for such other special detail as may be deemed necessary by their immediate police superiors. Their most important function at the club houses is for their presence there to develop mutual confidence and respect between the boys and representatives of the police force. The salaries of the Captain and policemen who have assignments to special duty with the clubs amount to about $50,000 yearly.

Each year the club corporation carries on a membership campaign under the direct supervision of its campaign chairman who is a civilian member of the Board of Directors. Solicitation for memberships is made by certain policemen who are assigned to such duty by their individual precinct Captain. The policemen who participate in the membership campaigns are in full uniform and in view of the public the majority of the time. Their presence in uniform fulfills one of the major responsibilities of a modern Police Department, "Prevention of Crime". The solicitation by the policemen is in their respective precincts and thus they are afforded an opportunity to become better acquainted with the citizens living in such precincts. They submit their collections to the campaign chairman and the treasurer and comptroller of the club corporation. While engaged in the membership campaigns the policemen are available for and perform general police duties. Representative of these duties are their functions in connection with fires, major accidents, large parades, Presidential appearances, directing school and rush hour traffic, as well as emergencies such as that created by the 1955 Capital Transit Strike.

The solicitation and fund raising done by policemen is with the consent and permission of the Board of Commissioners of the District of Columbia and is for the benefit of the club corporation and the boys who are its members, and not for the benefit of the police department or any other governmental agency. Memberships are also procured through sources other than police officers. For the years 1954 through 1957 the club corporation received over $300,000 annually from contributing memberships. Three-fourths or more of these sums were collected from private individuals by uniformed policemen in annual membership drives.

[*Woman's Auxiliary*]

The club corporation has a Woman's Auxiliary formed in accordance with its bylaws, and composed of 180 private citizens, not more than five of whom are wives of active or retired police officers. This Auxiliary is a self-contained unit which chooses its own members and elects its own officers and acts in cooperation with the Board of Directors of the club corporation. All matters of policy are subject to the approval of the Board of Directors. Its primary purpose is to raise funds by dues and special activities with which to purchase equipment for use in the clubs, and its average income is approximately $3,000 although on occasion it has raised as much as $6,000 a year.

The above recital gives the setting in which the plaintiff makes his claim that the club corporation is an agency of the District of Columbia Government and hence that its maintenance of racially segregated clubs is discrimination forbidden by the Fifth Amendment. He relies on Kerr v. Enoch Pratt Free Library of Baltimore 721, and Lawrence v. Hancock, 76 F.Supp. 1004, City, 149 F.2d 212, certiorari denied 326 U. S. But his reliance is misplaced. The cited cases depended on facts not present in the instant case.

[*Baltimore Library Case*]

In the Kerr case it was held that a colored woman was denied the equal protection of the law guaranteed by the Fourteenth Amendment in that she was refused admission to a library training class because of her color, the Library being an instrumentality of the state of Maryland and its Board of Trustees representative of the state. The history of the Library revealed Enoch Pratt, desiring to give the Library to the City of Baltimore, sought the aid of the state to found the Library as a public institution to be owned and supported by the city but to be operated by a self perpetuating board of trustees first named by him to safeguard the Library from political manipulation. This was accomplished by special act of the legislature with the

result that the library corporation was "completely owned and supported from its inception by the state" and the powers and obligations of the City of Baltimore and the Library Board of Trustees were conferred not by Mr. Pratt but by the state.

Conversely the evidence in the instant case does not show that the club corporation was ever "owned and supported" by the District of Columbia. The budget of the club corporation is not a part of the municipal budget as was the Library budget in the Kerr case. The 200 or more employees of the club corporation are not as were the Library employees on the municipal payroll. The boys clubs are not financed from any public treasury. The situation was different in the Kerr case, the city furnishing 99 per cent of the total cost of Library operations.

[*Swimming Pool Lease*]

The case of Lawrence v. Hancock, supra, involved a swimming pool constructed with public funds by a city pursuant to legislative authority. The city by leasing the pool sought to "relieve itself of the constitutional obligation to afford colored citizens equal rights with those of white citizens" in the use of the pool. The lease was given to a technically private corporation established for the purpose of operating the pool, the consideration being a dollar yearly. No restrictions were placed by the city on the lessee except that the lessee was to operate the pool safely, efficiently and for recreational purposes. All profits were to be used for improvements. The lessee was to control admissions. From the circumstances and the terms of the lease the court found that the lessee was planned by the city hoping to circumvent the Fourteenth Amendment and that the lessee was an instrumentality through which the city operated the pool. The court ruled that the city, if the pool is operated, must operate it itself, or, if leased, must see that it is operated without discrimination because of race.

Missing from the instant case are the critical facts present in Lawrence v. Hancock. The boys clubs were not set up as was the swimming pool by the city. Neither were the clubs established as was the pool with public funds under a legislative act. Moreover, the club corporation was not set up as a private corporation in a scheme to have the District of Columbia get around the Fifth Amendment.

[*Character of Corporation*]

It is well settled that aid given by a government to a private corporation is not enough in itself to change the character of the corporation from private to public. Maiatico Const. Co. v. United States, 79 F.2d 418, 65 U. S. App. D. C. 62, certiorari denied, 296 U.S. 649. This case involved interpretation of a Federal statute requiring a person entering into a contract with the United States for the construction of a "public building" or completion of any "public work" to execute a bond conditioned that the contractor shall promptly make payment to all persons supplying him with labor and materials in the prosecution of the work, and giving to all such persons the right to intervene in a suit upon the bond. In a suit claimed to be on such a bond the question was whether three dormitories built on land owned by Howard University (a private corporation) were "public buildings" or "public works", the United States having borne the cost of the dormitories and entered into the agreement with the contractor for their erection. It became necessary to decide whether Howard University had lost its private character because of an Act of Congress providing for large annual appropriations for construction, maintenance and development of the institution including payment of personnel, and stipulating that the University be open for inspection by the Bureau of Education and that the Bureau report yearly to Congress regarding its inspection.

In reaching the conclusion that the University had retained its character as a private corporation, that its rights, powers and liabilities were fixed by its character and the laws in relation to private corporations, and that the dormitories involved were neither public buildings nor public works, the court said in part:

> "Congress has passed no law giving the Secretary of the Interior or any other officer of the government control of the University, and we think it could not do so without the consent of the corporate authorities of that institution. Hence in the view we take, the generosity of the government is not enough in itself to change a private into a public institution."

The court cited many cases supporting its ruling and distinguishing public corporations from private corporations, and concluded as follows:

"Numerous other cases to the same effect can be cited and, so far as our examination has gone, there are none to the contrary; and so we reach the conclusion that Howard University is a private institution;

"That its right and title to its buildings is not affected by the fact that many of them may be the result of the generosity of the national government * * *."

[*Club Not "Public"*]

It is the view of this court that the upholding of the contention in the instant case that the club corporation has become an agency of government because of aid given it by the District of Columbia as above outlined would not only be contrary to legal precedent but would produce startling results as well. The Board of Commissioners of the District of Columbia has allowed the use of property and facilities belonging to the District to certain private institutions in the pursuit of their civic, benevolent and charitable objects. Among these institutions are several societies for the blind, Alcoholics Anonymous, a nursery school, and a congress of parents and teachers. In the money raising campaign for the benefit of agencies such as the Boy Scouts, the Red Cross, the Salvation Army, and the Prevention of Blindness Society which is now being conducted by the United Givers Fund of the National Capital Area, Inc., many government employees are being permitted to solicit contributions on official time as policemen have done for the club corporation. If each time a government lends its assistance to a private institution it were to acquire that institution as an arm of government, then government would indeed become a many armed thing. According to the two members of the Board of Commissioners of the District of Columbia who are before the court the Board treats as a matter within its discretion such aid as the District gives to private institutions whose activities promote community interests. In their judgment the time that police officers devote to Boys Club work cannot be considered a deviation from police duties since the moulding of the future of the city's underprivileged boys towards good citizenship constitutes a major phase of police work, and ultimately accomplishes the prevention of juvenile delinquency and crime. However that may be, it is clear that police officers only participate in the affairs of the club corporation. They do not control the corporation. Government control is the decisive factor in the determination of whether a corporation is public or private and governmental control of the club corporation does not exist. The club corporation, a private institution, acting on its own initiative and expressing its own will, may segregate its clubs without thereby offending the guaranties of the constitution. National Federation of Ry. Workers v. National M. Board, 110 F.2d 529, 71 U.S. App. D. C. 266, certiorari denied, 310 U.S. 628.

On the basis of the facts in the present case and established principles of law the court concludes:

(1) That the Boys Club of Metropolitan Police, D. C., is a private charitable corporation, directed, maintained, and operated predominantly by private citizens;

(2) That the use of certain District of Columbia property and facilities by said club corporation and the participation of policemen in its work and in its fund raising campaigns have not changed its private nature or made it an instrument of government for the administration of public duties;

(3) That said club corporation is not a de facto arm or agency of the District of Columbia government;

(4) That the practice of said club corporation of maintaining segregated clubs is private action not forbidden by the Fifth Amendment;

(5) That the court is not empowered to interfere with the segregation practices of a private corporation;

(6) That the court lacks jurisdiction over the statutory three member Board of Commissioners for the District of Columbia, only two members of the Board being defendants in this action; and

(7) That the complaint should be dismissed as to all defendants.

GOVERNMENTAL FACILITIES
Swimming Pools—California

Susan McCLAIN, by her guardian ad litem, Mildred McClain Johnson v. City of SOUTH PASADENA et al.

District Court of Appeal, 2d District, California, November 22, 1957, 318 P.2d 199 (1957).

SUMMARY: The plaintiff, a Negro, brought an action in a California state court against the city of South Pasadena and city officials. The action sought damages under the California "civil rights act" for having been denied the use of a municipal swimming pool on the basis of race or color. The trial court found that, at the time in question, a valid rule of the city's department of recreation limited use of the swimming pool to city residents and that the plaintiff was not a resident of the city. The action was dismissed. 1 Race Rel. L. Rep. 897 (Los Angeles Super Ct. 1956). On appeal the District Court of Appeal affirmed, finding the regulation limiting the use of the swimming pool to city residents to be reasonable and the exclusion of the plaintiff not to have been made on racial grounds.

Before SHINN, P. J. and VALLEE and WOOD, JJ.

VALLEE, J.

Plaintiff, a Negro, brought this suit for damages and an injunction against the city of South Pasadena and officers and employees thereof on the alleged ground she had been unlawfully excluded from the municipal plunge on August 2, 1955 because of her race. The complaint alleges "plaintiff now brings this action under Sections 51, 52 and 53 of the Civil Code". The prayer is for $1,000 damages against each defendant and for an injunction restraining defendants from excluding plaintiff from the South Pasadena municipal plunge.

Defendants admitted plaintiff had been excluded from the plunge but alleged the exclusion was solely on the ground she was a nonresident of South Pasadena and that one of the requirements for admission to the plunge was that admittees be residents of South Pasadena.

The cause was tried by the court without a jury. At the trial plaintiff moved for judgment on the pleadings on the ground the regulation excluding nonresidents from the plunge is unlawful. The motion was denied. Judgment was for defendants. Plaintiff appeals.

On August 2, 1955 South Pasadena was a city of the fifth class located in the County of Los Angeles with a population of about 19,000.[1] At that time there apparently were no Negroes residing within the City.

[*Regulation Adopted*]

Since 1939 the city has owned and operated through its Department of Recreation a municipal plunge. An admission fee is charged. In 1942 the Recreation Commission adopted this regulation:

"The use of the pool and the recreational facilities adjacent thereto is limited to residents of the City of South Pasadena."[2]

1. In August 1955 section 34111 of the Government Code provided that Cities having a population of more than 8,000 and not exceeding 20,000 are cities of the fifth class. Effective September 7, 1955 section 34111 and other sections classifying unchartered cities were repealed and section 34102 added reading: "Cities organized under the general law shall be 'general law cities.'" (Stat., 1955, c. 624, p. 1120, 53, 54.)

2. The regulation was one of several adopted at the same time. They read:

"CITY OF SOUTH PASADENA
"DEPARTMENT OF RECREATION

"The Superintendent and employees of the South Pasadena Recreation Department will endeavor to maintain these premises so that patrons can enjoy them to the utmost and at the same time be assured of health and safety.

"We request the full cooperation of our patrons in obeying these Rules and Regulations.

"1. The use of the pool and the recreational facilities adjacent thereto is limited to residents of the City of South Pasadena.

"2. No profane or indecent language will be permitted.

"3. The conduct of patrons shall be above reproach at all times.

"4. No smoking by players in competitive games will be permitted. (Good sportsmen refrain from smoking while playing in any game.)

"5. The use of intoxicating beverages on the playgrounds is strictly prohibited and also those persons under its influence.

"6. Dogs are not allowed on the playgrounds except on leash.

The regulation was adopted due to the fact that so many nonresidents were making use of the plunge that residents of South Pasadena had difficulty in obtaining entrance to it.

The plunge is 50 by 100 feet and has a comfortable capacity of about 350 simultaneous users. In June 1955 there were about 6,000 users; in July, about 14,000. The peak usage is in the month of August. In August 1955 over 15,000 users, or about 500 a day, were recorded. It is the only municipally owned plunge in South Pasadena.

[*Plaintiff Denied Admission*]

In the afternoon of August 2, 1955 John H. Abbott, a Caucasian residing in the City of Los Angeles, took his two daughters and plaintiff, a 9-year-old Negro girl, also a resident of Los Angeles, to the plunge. He purchased and received four tickets of admission. At this point the cashier, defendant McColgan, noticed plaintiff and asked Abbott if she was in his party. He said, "Yes." McColgan told him, "We couldn't let them in because we have a policy that we reserve the right of use of the pool to residents." She testified she knew plaintiff was not a resident because at that time there were no Negro families living in South Pasadena. She then called the assistant manager, defendant Skraba. Skraba asked Abbott if he were a resident of South Pasadena and Abbott said, "No." Skraba said, "Therefore, according to our policy, you must be excluded because you are non-resident". Abbott, his two children, and plaintiff were denied admission to the plunge.

Dr. Martin, a member of the Recreation Commission from 1941 to 1944, testified the plunge was the only one of any size in the vicinity and that when it was newly built it attracted so many nonresidents that residents of South Pasadena had difficulty in obtaining entrance to the use of the facilities. Consequently, the Recreation Commission approved the regulation restricting use of the plunge to residents of South Pasadena.

Skraba testified he worked as a lifeguard and assistant plunge manager during the summer seasons for the years 1953 through 1955 and that he was instructed by the superintendent of the Department of Recreation, defendant Seiler, and the manager of the plunge, defendant Cornell, that the city had a regulation limiting use of the plunge to residents of the city; he was not instructed to exclude from the plunge any person on the ground of race, color, or creed. He testified the regulation was invoked in 1955 to exclude nonresident Caucasians.

[*No Racial Discrimination*]

The plunge is open from about the middle of June through September for use by residents of South Pasadena on Monday through Saturday from 10:00 to 12:00 and from 1:00 to 5:00; Monday, Wednesday, and Friday evenings from 7:00 to 10:00; and Sundays from 1:00 to 5:00. Occasionally at other hours the plunge has been rented to various organizations without restriction as to race, color, or creed. There was testimony by a Mr. Acorn, who made arrangements with the Recreation Department for rental of the plunge by the churches of South Pasadena in 1955, that no restriction was made with regard to the use of the plunge by members of the Negro race or any other race, color, or creed who might be using it as a part of his group. In 1955 the plunge was rented to a Japanese Buddhist organization and no restriction was specified by South Pasadena as to the use of the plunge by members of the organization with respect to race, color, or creed.

There was much evidence from past and present city officials that South Pasadena has never adopted a regulation, rule, policy, or schedule of any kind limiting, restricting, or excluding Negroes from any recreation facility owned or operated by the city because of race or color.

There was no evidence that any Negro resident of South Pasadena was denied admission to the plunge at any time since it was built.

[*Findings of Trial Court*]

The court found: 1. On August 2, 1955 there

"7. Good sportsmanship shall be practiced in the use of the courts.

"8. Additional rules for the plunge.

"(a) The management does not assume liability for articles checked, although reasonable care will be taken to prevent loss.

"(b) The management reserves the right to refuse admittance to any person not presenting a currently dated medical certificate from a resident physician.

"(c) Showers are required before entering the plunge.

"(d) Smoking prohibited on plunge deck except in designated area.

"(e) Smoking by children prohibited at all times.

"(f) No candy or gum allowed in the pool.

"(g) No lunches on pool deck or locker room."

was in existence a regulation of the city of South Pasadena and its Department of Recreation requiring persons who used the plunge to be residents of the city, and on that day McColgan and Skraba knew of the regulation. 2. The plunge was the only such facility publicly owned and operated in and by the city; the plunge was of such size and capacity, the city was so populated, and the seasonal use of the plunge was of such extent and character that the regulation was reasonably justified to assure the orderly use of the plunge and its maximum usefulness. 3. Plaintiff was not a resident of South Pasadena and she was denied permission to use the plunge solely because of the regulation and not on account of her race or color. 4. At no time did South Pasadena, its Department of Recreation, or any of its officers or employees adopt or issue any regulation, rule, policy, custom, or usage which prohibited persons of Negro extraction from use of public recreation facilities on account of their race or color. 5. Persons of Negro extraction have always been permitted to use the public recreational facilities of South Pasadena on the same basis as persons of all other races and colors. 6. Plaintiff did not sustain any embarrassment, humiliation, chagrin, mental anguish, hurt feelings, or physical or mental suffering because of any act, conduct, practice, or omission on the part of defendants. 7. Injunctive relief is not necessary or proper. 8. Plaintiff has not been damaged at all by reason of any regulation, rule, act, or omission of any defendant. The court concluded plaintiff was lawfully denied permission to use the plunge on the occasion alleged and she was not on that occasion denied any right, privilege, or immunity, or deprived of due process of law or the equal protection of the laws.

[*Demurrer*]

It is asserted the court erred in denying plaintiff's motion for judgment on the pleadings. A plaintiff may recover judgment on a motion for judgment on the pleadings only if his complaint states facts sufficient to constitute a cause of action and the answer neither raises a material issue nor states a defense. (Barasch v. Epstein, 147 Cal. App. 2d 439, 440.) The complaint alleged that the regulation of South Pasadena prohibited entry into or use of the plunge by all persons of Negro extraction and that plaintiff was excluded solely because she is a Negro. The answer denied these allegations and alleged that in addition to a ticket of admission another requirement to gain admission to the plunge was that persons be residents of South Pasadena. The complaint alleged and the answer denied that Abbott purchased four tickets of admission including one for plaintiff. The answer alleged plaintiff was denied entrance to the plunge solely on the ground she was a nonresident of South Pasadena; to wit, a resident of Los Angeles. The answer alleged, "Persons of negro extraction have always been permitted and are now permitted to use, and have used, the public recreational facilities of the City on the same basis as persons of all other races and colors." Every allegation affirmatively pleaded in the answer must be deemed true. (Cuneo v. Lawson, 203 Cal. 190, 193.) Issues of fact were raised. The motion for judgment on the pleadings was properly denied.

It is next asserted the finding that plaintiff was not denied admission to the municipal plunge on account of her race or color is against the weight of evidence. The point is without substance. The prerogative of weighing evidence is in the trier of fact. We do not reweigh the evidence on review. When it is claimed the evidence is insufficient to support the findings the function of a reviewing court ends when it finds substantial evidence in the record which supports the findings. The evidence related supports the finding in this respect.

[*Civil Rights Law*]

Plaintiff challenges the validity of the regulation on the ground it violates sections 51-53 of the Civil Code. Section 51 provides that all citizens under state jurisdiction are entitled to the full and equal accommodations, advantages, facilities, and privileges of bathhouses, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law applicable alike to all citizens.[3] Section 52 prescribes the liability of

3. Section 51 reads: "All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens."

persons who deny such accommodations and privileges "except for reasons applicable alike to every race or color," or make "any discrimination, distinction or restriction on account of color or race, except for good cause, applicable alike to citizens of every color or race whatsoever."[4] Section 53 provides that it is unlawful for the proprietor of any place of public amusement or entertainment to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such ticket, and who demands admission to such place.[5]

Contrary to the suggestion of plaintiff, section 53 has no application. It applies only to the refusal of admittance "to any person over twenty-one years." (See Weaver v. Pasadena Tournament of Roses, 32 Cal. 2d 833, 838.) Plaintiff was nine years old in August 1955. Jones v. Kehrlein, 49 Cal. App. 646, does not decide otherwise. Jones, a minor, recovered under sections 51 and 52 and, the court held, properly so. The court said section 53 "was never intended to form a defense to an action by one whose rights under sections 51 and 52 have been violated."

The intent of section 51 is to give all persons full and equal accommodations and privileges in places of public accommodation and amusement, "subject only to the conditions and limitations established by law, and applicable alike to all citizens." Sections 51 and 52 are to be read and construed together. Under section 52 liability is imposed only if the denial of the accommodations, facilities, and privileges enumerated in section 51 is not "for reasons applicable alike to every race or color," or only if the citizen is discriminated against on account of race or color and the discrimination is not "for good cause, applicable alike to citizens of every color or race whatsoever." The regulation in question is applicable "alike to every race or color," and it applies "alike to citizens of every color or race whatsoever." The phrase in section 52 "or except for good cause" is to be read "or (whoever makes any discrimination, distinction, or restriction) except for good cause." In other words, any unreasonable discrimination is forbidden. If the ground of exclusion is reasonable it is valid. (Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 737, 740-1.) The question remains whether the regulation restricting use of the plunge to residents of South Pasadena is reasonable.

[*Equal Protection Clause*]

Plaintiff invokes the equal protection of the laws provision of the Constitution of the United States[6] and the privileges or immunities provision of the Constitution of California.[7] Problems of classification under the California Constitution are similar to those presented by the equal protection clause of the Fourteenth Amendment. Under either provision "the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary,' or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. (Citations.) When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing

4. Section 52 reads: "Whoever denies to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty-one of this code, or who aids, or incites, such denial, or whoever makes any discrimination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating house, place where ice cream or soft drinks are sold for consumption on the premises, barber shop, bath house, theater, skating rink, public conveyance, or other public place of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction or restriction, for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose."

5. Section 53 reads: "It is unlawful for any corporation, person, or association, or the proprietor, lessee, or the agents of either, of any opera house, theater, melodeon, museum, circus, caravan, race-course, fair or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such ticket, and who demands admission to such place. Any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement."

6. Fourteenth Amendment.

7. Article I, section 21.

arbitrary action rests upon the one who assails the classification." (People v. Western Fruit Growers, 22 Cal. 2d 494, 506-7.) When a municipal regulation is within the power of the municipality the presumption is that it is reasonable unless on its face unreasonableness is apparent, and reasonable doubts regarding its validity, if any, will be resolved in its favor. (Nat. Milk etc. Assn. v. City etc. of S.F., 20 Cal. 2d 101, 114; Matter of Application of Miller, 162 Cal. 687, 696; Glass v. City of Fresno, 17 Cal. App. 2d 555, 560; Sawyer v. Barbour, 142 Cal. App. 2d 827, 833.)

[*Regulation Valid*]

All differentiation by municipal regulation as to nonresidents is not constitutionally prohibited and void. (Hansen v. Town of Antioch, 18 Cal. 2d 110. See Webb v. State University of New York, 125 F.Supp. 910, app. dis'd. 348 U.S. 869, 99 L.Ed. 683, 75 S.Ct. 113.)[8] It is only when the municipal regulation discriminates unreasonably that it violates constitutional requirements. (People v. Gilbert, 137 N.Y.S. 2d 389, 392; People v. Kraushaar, 89 N.Y.S. 2d 685, 688; City of Ottumwa v. Zekind, 95 Iowa 622, 64 N.W. 646, 647.) A regulation making different provision for people residing outside a municipality from those residing in it is valid if the classification is based on a reasonable distinction. Such a regulation is not unconstitutional because it results in some practical inequality. All so-called local option regulations are based on this principle. (Hearth v. Village of Downers Grove, 278 Ill. 92, 115 N.E. 869, 870. See Kellar v. City of Los Angeles, 179 Cal. 605.) A municipal regulation applying alike to all persons similarly situated, without distinction as to nationality, race, color, or creed, is not in violation of the federal or state Constitutions. (Barbier v. Connolly, 113 U.S. 27, 28 L.Ed. 923, 924-5, 5 S.Ct. 357; Hinq v. Crowley, 113 U.S. 703, 28 L.Ed. 1145, 1147, 5 S.Ct. 730; Ex parte Moynier, 65 Cal. 33, 36.) Under the requirements of the Constitutions the question is whether the regulation restricting use of the plunge to residents of South Pasadena is reasonable.

8. In Sivertsen v. City of Menlo Park, 17 Cal. 2d 197, the court stated (p. 199): "It is not denied by the appellant and it is well established by the authorities that there may be discrimination between businesses of the same character located within and those located without the boundaries of a municipality in regard to license fees."

[*Police Power*]

Plaintiff says the regulation is not a lawful exercise of the police power. Any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. (Const., art. XI, 11; Simpson v. City of Los Angeles, 40 Cal. 2d 271, 278.) The power to make local and police regulations is very broad and far-reaching. Except to the extent that the Legislature has decreed otherwise, South Pasadena may pass and enforce any reasonable regulation with respect to the use of its municipal plunge. "A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. Every intendment is to be indulged by the courts in favor of the validity of its exercise and unless the measure is clearly oppressive it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals or general welfare that it will be nullified by the courts." (Magruder v. City of Redwood, 203 Cal. 665, 672.) If good grounds for a classification in a municipal regulation exist, such classification is not void because it does not embrace within it every other class which might be included. (Keenan v. S.F. Unified School Dist., 34 Cal. 2d 708, 713.) It is implicit in the theory of the police power that an individual cannot complain of incidental injury, if the power is exercised for proper purposes of public health, safety, morals, and general welfare, and if there is no arbitrary and unreasonable application in a particular case. (McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 890.) A classification is reasonable if it has a substantial relation to a legitimate objective to be accomplished. (Dribin v. Superior Court, 37 Cal. 2d 345, 352.) Thus the regulation is a valid exercise of the police power if it is reasonable.

[*Enforcement of Regulation*]

It is argued that nonresidents on occasions used the plunge prior to August 1955 and that such use invalidated the regulation. The fact that a municipal regulation may not have been enforced uniformly against all violators does not render it discriminatory. The arbitrary and discriminatory character of a regulation that vitiates it does not lie in its misapplication or maladmin-

istration by those entrusted with executing it. (Zucht v. King (Tex. Civ. App.), 225 S.W. 267, 273; City of Denver v. Girard, 21 Colo. 447, 42 P. 662, 664; City of Omaha v. Lewis & Smith Drug Co., 156 Neb. 650, 57 N.W.2d 269, 272; Hoyne v. Wurstner (Ohio App.), 63 N.E.2d 229, 233; Cunningham v. City of Niagara Falls, 242 App. Div. 39, 272 N.Y.S. 720, 722-3; Wade v. City and County of S.F., 82 Cal. App. 2d 337, 339.)

[*Use of Federal Funds*]

It is asserted that because the plunge was constructed at least in part from funds obtained by South Pasadena from the federal government that all persons resident in the United States have the right to its use. Section 37351 of the Government Code provides that the legislative body of a city of the fifth class may purchase or receive such personal property and real estate as is necessary or proper for municipal purposes, and that it may control *"such property for the benefit of the city."* (Italics added.) At the time in question section 39732 of the Government Code authorized the legislative body of a city of the fifth class to "Acquire, own, construct, maintain, and operate . . . parks, and baths." Section 37354 authorizes the legislative body of any city to accept any gift made to the city. Section 37355 provides that if the terms of a gift do not prescribe or limit the uses to which the gift may be put, it may be put to such uses as the legislative body prescribes. The terms of the gift of whatever funds may have been received from the federal government did not prescribe or limit the use to which the gift might be put other than it was "to aid in financing the construction of a municipal swimming pool and bath house." The fact that South Pasadena may have received part of the funds with which to build the plunge from the federal government does not give all persons resident in the United States the right to use it. Whatever the source of the funds, the plunge is the property of South Pasadena.

The crux of the case is, therefore, whether the regulation restricting use of the plunge to residents of South Pasadena is reasonable. We think it is. There is no arbitrary formula by which the reasonableness of a regulation such as that in question can be tested. Its validity depends, to a considerable extent, on surrounding circumstances and its purposes and operation. Regard must be had for its object and necessity.

In maintaining and operating the plunge South Pasadena is acting in a governmental capacity. This is true even though an admission fee is charged. (Crone v. City of El Cajon, 133 Cal. App. 624, 628-9; Kellar v. City of Los Angeles, 179 Cal. 605, 608; Hannon v. City of Waterbury, 106 Conn. 13, 136 A. 876.) The maintenance and operation of a municipal plunge is primarily for the especial benefit of the inhabitants of the municipality in which the plunge exists. (Hannon v. City of Waterbury, 106 Conn. 13, 136 A. 876, 877.) The plunge is maintained by the taxpayers of South Pasadena. It is maintained to promote the health, morals, comfort, convenience, and general welfare of the residents of the city. A fundamental function and prime duty of a municipality is to preserve the health of its residents. (Kellar v. City of Los Angeles, 179 Cal. 605, 609.) "Children's playgrounds and recreation centers established and maintained by a city *for the general use of the children of the city,* where so conducted as to partake in no degree of the nature of a private business enterprise, do not substantially differ from a public park in so far as the question here involved is concerned. Like the public parks, they are referable solely to the duty of maintaining the public health, and have nothing of the nature of an ordinary business enterprise." (Italics added. Kellar v. City of Los Angeles, 179 Cal. 605, 609. See in re Thomas, 10 Cal. App. 375, 377.)

[*Parking Lot Case*]

In People v. Gilbert, 137 N.Y.S. 2d 389, the village of Larchmont established a parking lot exclusively for the inhabitants of the municipality. The court stated (p. 392):

> "The Court sees no good reason why a municipality should not be permitted to set aside a parking area exclusively for the use of its own residents. . . .
>
> "All residents of the Village of Larchmont are similarly treated in furtherance of a legitimate public object. The attempt to control the difficult problem of parking cannot be held to be arbitrary."

Jones v. Hammer, 143 Wash., 525, 255 P. 955, says that a classification based on residence in a county as against residence outside is neither arbitrary nor unreasonable. (Also see Haavik v.

Alaska Packers' Asso., 263 U.S. 510, 68 L.Ed. 414, 417, 44 S.Ct. 177; McCready v. Commonwealth of Virginia, 94 U.S. 391, 24 L.Ed. 248; Lyman v. Adorno, 133 Conn. 511, 52 A.2d 702, 707-8; People v. Kraushaar, 89 N.Y.S. 2d 685, 688. Cf. Pasadena City High School Dist. v. Upjohn, 206 Cal. 775.)

A regulation designed to prevent congestion in a municipal plunge is a valid exercise of the police power for the health, safety, morals, and general welfare. The very nature of a plunge limits the number of those who may use it at one time. The purpose of the regulation is to avoid congestion in the plunge; for a proper distribution of patrons; and for the better protection, safety, comfort, convenience, and health of persons using it. As the trial court found, the plunge was of such size and capacity, the city was so populated, and the seasonal use of the plunge was of such extent and character that the regulation was reasonably justified to assure the orderly use of the plunge and its maximum usefulness. Bathing is a recognized public use, and one of the objects of regulation is to secure the orderly use of municipal facilities.[9]

[*Regulation Reasonable*]

The regulation excludes all nonresidents, irrespective of race, color, or creed. It operates equally on all persons similarly situated and uniformly on all persons within the same class. Nonresidents are not situated similarly to residents. Persons are not similarly situated if there is any reasonable difference in their relation to the purposes of the regulation. The classification is reasonably related to the end in view. It bears a real and substantial relation to the health, safety, morals, and general welfare of the residents of South Pasadena. South Pasadena has the sovereign duty of maintaining the health of its residents. (Kellar v. City of Los Angeles, 179 Cal. 605, 608.) It owes no such duty to nonresidents. Residents are entitled to preference over nonresidents and such action is not in contravention of the rights of nonresidents. The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness, and interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits. (37 Am. Jur. 736, 122.) There is no classification of racial groups residing within South Pasadena. If plaintiff's position were sustained, nonresidents of South Pasadena from anywhere in the country would have carte blanche to use the plunge. The regulation restricting use of the plunge to residents of South Pasadena was a reasonable regulation.

We are not to be understood as implying that an owner of property in a municipality who is a nonresident thereof could be excluded from use of a plunge owned by the municipality. That question is not before us.

Plaintiff was not excluded from the plunge because she is a Negro. She was excluded, like the Caucasians who were with her, because she was a nonresident. If she had been a resident of South Pasadena, under the uncontradicted evidence, she would have been admitted. There was no unreasonable or unlawful discrimination.

Affirmed.

VALLEE, J.

We concur.
SHINN, P. J.
WOOD, J.

9. "Swimming is a universal recreation of the highest order. It is a most healthful, invigorating, and agreeable exercise. It has an economic as well as a social value in conserving health. It strengthens one's lungs, because it compels deep breathing. It strengthens the nervous system, because it induces natural sleep. It strengthens the spine and enlarges the chest, because it causes the head to be thrown back and the chest out. It strengthens and sets right the pelvic organs, because the body is in motion on the horizontal plane. It strengthens the skin and prevents the growth of gray hair. It reduces the corpulent and rounds out the attenuated. One forgets his business cares while swimming, and thus it helps to preserve his mental balance as well as muscular symmetry. By correcting tendencies to weakness in various ways, it improves one's temper and disposition, for 'a healthy liver maketh a cheerful man.' It relieves strain on the human constitution caused through inactivity. There is no better exercise than swimming to offset the evils of a sedentary life, as it brings into activity every muscle in the body without any undue strain on any one set of muscles. It keeps the muscles supple, enlarges the diaphragm and the thorax, wards off tuberculosis, straightens the spinal column, corrects humpback, and evils that arise from the use of improper clothing. It strengthens the skin, the muscles of which are brought into action being released from the weight and tension of heavy garments. See At Home in the Water, pp. 6, 7, by Geo. H. Corsan.

"We conclude that cities with propriety may have parks with modern, sanitary pools *to which its citizens may resort for the benefit of their health.* Whatever encourages or induces the ordinary 'city shut-in' to seek exercise, relaxation, recreation, or healthful amusement is a means redounding to the public welfare and should be approved." (Smith v. Fuest, 125 Kan. 341, 263 P. 1069, 1070. Italics added.)

TRANSPORTATION
Buses—Florida

Leonard D. SPEED, Joseph SPAGNA, and Johnny HERNDON, Appellants v. CITY OF TALLAHASSEE, Florida, Appellee

Circuit Court of 2nd Judicial Circuit, Leon County, Florida, November 15, 1957, at Law No. 8581.

SUMMARY: Appellants were convicted in a municipal court of violating Tallahassee Ordinance 741 which makes it a misdemeanor to take a seat on a bus other than as directed by the driver (see 2 Race Rel. L. Rep. 459). Without reaching a racial question, the circuit court affirmed the conviction.

WALKER, Circuit J.

This cause coming on to be finally heard upon the appeal entered herein on the 4th day of March, A. D. 1957 from a judgment and sentence pronounced against appellants in the Municipal Court of the City of Tallahassee, Florida, and counsel for the respective parties having filed briefs and orally argued the said cause before this court, and the record in said cause having been examined and no denial of any constitutional or statutory right of appellants, or prejudicial error otherwise, having been made to appear, and the court being duly advised in the premises, it is, therefore,

CONSIDERED, ORDERED AND ADJUDGED that the order or judgment appealed from, as pronounced against each of said appellants, be and the same is hereby affirmed, and the costs incident to this appeal, in the amount of $0.00, are taxed against the said appellants.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 15th day of November, A. D. 1957.

PUBLIC ACCOMMODATIONS
Restaurants—District of Columbia

Leopoldine M. TYNES v. Pandora P. GOGOS

Municipal Court for the District of Columbia, November 22, 1957, No. M 27219-57.

SUMMARY: The plaintiff, a white woman, brought a civil action for damages in federal district court in the District of Columbia against the proprietor of a restaurant. The complaint alleged that the plaintiff had suffered humiliation and other emotional distress because she was barred from dancing with her husband, a Negro, in violation of District ordinances.[a] The suit was transferred to the District Municipal Court. The Municipal Court dismissed the action. The opinion of the court states that the ordinances in question do not give rise to a civil cause of action to a person in plaintiff's class.

a. The ordinance of June 10, 1869, referred to in the opinion, provides:

> "Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington, That from and after the passage of this act it shall not be lawful for any person or persons, who shall have obtained a license from this Corporation for the purpose of giving a lecture, concert, exhibition, circus performance, theatrical entertainment, or for conducting a place of public amusement of any kind, to make any distinction on account of race or color, as regards the admission of persons to any part of the hall or audience-room where such lecture, concert, exhibition, or other entertainment may be given: Provided, That any person applying shall pay the regular price charged for admission to such part of the house as he or she may wish to occupy, and shall conduct himself or herself in an orderly and peaceable manner, while on the premises; and any person or persons offending herein shall forfeit and pay to this Corporation for each offense a fine of not less than ten nor more than twenty dollars, to be collected and applied as are other fines."

The amendment of 1870 to that ordinance increased the fine to not less than fifty dollars. Sections 1 and 2 of the 1873 Act provide for the posting of a schedule of prices by restaurants and other eating or drinking establishments and for the filing of those schedules with the Register of the District. Section 3 provides in part:

MEMORANDUM OPINION

WALSH, Chief Judge.

The above entitled action was originally filed in the United States District Court. A Motion to Dismiss was filed in June of 1957, and the case was certified to the Municipal Court in August of 1957. On September 19, 1957, the matter came before the undersigned for argument of the Motion to Dismiss.

Plaintiff's claim is for damages alleged to have been suffered as a result of violation of one of two ordinances in force in the District of Columbia:

> (1) The Act of the Corporation of the City of Washington, enacted by the Council of the City of Washington, and approved June 10, 1869, as amended by the Act of March 7, 1870; and
>
> (2) The Act of 1873, enacted by the Third Legislative Assembly of the District of Columbia, ch. 45, sec. 1, pg. 116.

The issue at hand is: Can a civil action for damages arise from a violation of these acts?

[*Validity of Acts*]

Plaintiff relies on the violation of certain ordinances of the District which make it a punishable offense to discriminate against customers in certain establishments. The validity of these laws and their present enforceability are beyond question at this time. See: Thompson Restaurant Co. vs. District of Columbia, 73 S.Ct. 1007; Central Amusement Co. vs. District of Columbia, 121 A.2d 865.

Plaintiff also relies on the Act of the Second Legislative Assembly of the District of Columbia, June 20, 1872. In the Thompson case, supra, on remand to the United States Court of Appeals for the District of Columbia, this Act was held to have been repealed by the Act of 1873 (93 U.S. App. D.C. 373 [1954]).

The general grants of authority to enact ordinances are contained, first as to the City of Washington, in the Act of May 3, 1802, 2 Stat. 195, ch. 53, and as to the Legislative Assembly, in the Act of February 21, 1871, 16 Stat. 419, ch. 62. Section 7 of the Act of 1802 gave the council the right to:

> ". . . provide for licensing, taxing and regulating, auctions, retailers, *ordinaries, and taverns*, hackney carriages, wagons, carts, and drays, pawnbrokers, vendors of lottery tickets, money changers, and hawkers and peddlers; to provide for licensing, taxing, regulating, or restraining, theatrical or public shows and amusements." (underscoring [*italics*] supplied)

This section was carried down to the time of the creating of the Legislative Assembly by various Acts of Congress continuing in existence the charter and functions of the City of Washington. The Legislative Assembly received its first legislative authority by virtue of sections 5 and 18 of the Act of 1871, with certain exceptions not applicable to the instant case.

[*Status of Acts*]

Plaintiff contends that a violation of these ordinances gives rise to a civil cause of action for damages. In order to determine if such is the case, it must first be determined just what these acts are and their legal efficacy. In the Central Amusement Co. case, supra, the Court, in footnote (1), said:

> "While officially referred to as an Act we use the term regulation, as it appears to be a regulatory measure in the nature of a police regulation. See District of Columbia v. John R. Thompson Co., 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480."

Being regulatory or penal in nature, do any other rights accrue to individuals as a result of a violation? In 1 C.J.S., Actions, Sec. 11, at page 994, the following is set out:

> "If the act in question is an actionable one, the fact that it is made criminal by

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"That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment".

Section 4 of the Act provides for a fine of $100 and the forfeiture of the license and a prohibition against its reissuance for a period of one year after the forfeiture.

statute does not affect the private right of action; and under this rule the fact that a breach of a duty imposed by statute, for which a civil action will lie, is made a crime does not preclude a person in whose favor such duty exists from maintaining an action for an injury caused by the breach. If, however, the act is not independently actionable, a statute making it criminal gives no private right of action in the absence of a provision authorizing a civil remedy."

In Section 12, the following statement regarding municipal ordinances is set out:

"*Duty imposed by ordinance.* A violation of a municipal ordinance, which creates a duty merely for the benefit of the general public, and imposes a penalty for a breach thereof, does not give rise to a private right of action in favor of a member of the public who is injured thereby, unless the act which is made the subject of the penalty is, independently of the ordinance, an actionable wrong."

In Mazullo v. Maletz, 118 N.E.2d 356 (Mass., 1954), the Court held that the penal statute in question did not give rise to a civil cause of action. The statute and governing principles of law are set out in the following excerpts:

"Section 110, as amended by St. 1937, c. 136, reads 'whoever wilfully conspires with a person unlawfully or improperly to commit to an institution for the insane a person who is not insane or wilfully assists in or connives at such commitment shall be punished by a fine or imprisonment, at the discretion of the court'. The plaintiff contends that this statute creates a cause of action for civil conspiracy. We do not agree. There are instances, to be sure, where the violation of a penal statute has certain legal consequences in civil litigation. For example, in actions of tort for negligence it frequently happens that the violations of a penal statute will constitute evidence of negligence. But such statutes are not ordinarily construed as creating new causes of action."

"In general it may be said that penal statutes have been construed as creating a new cause of action independently of the common law if, and only if, that appears by express terms or by clear implication to have been the legislative intent. All that that section does is to create a criminal offense and to provide penalties for its violation; it does not create a civil cause of action;"

This rule is well stated in the case of O'Dell v. Humble Oil and Refining Co., 201 F.2d 123 (10 Circ., 1953), cert. denied 345 U.S. 941, where the Court said:

"We accordingly conclude from a consideration of the authorities that where a penal act is passed for the benefit of a class, the violation of the criminal statute resulting in injury to one of such class gives him a cause of action which he may assert in any court of competent jurisdiction, notwithstanding that no reference is made to such a right in the act, and also that where a cause of action exists at common law for the commission of a tort, the passage of a penal statute in the interest of the public and providing for sanctions for its violation does not in the absence of clear language to the contrary wipe out such preexisting common law action; but that where a penal statute is passed in the interest of the public, the commission of a violation of which did not give one injured thereby a cause of action at common law, no such cause of action arises in the absence of clear language evidencing a Congressional intent to give one injured thereby a cause of action in addition to the sanctions provided for its violation."

Was there an action for violations of civil rights at common law? Treating civil rights in the limited field of discrimination because of race or color, there does not appear to be any civil action brought for damages prior to the 13th, 14th, and 15th Amendments, and the Civil Rights Act of April 9, 1866, 14 U.S. St. at L., pg. 27, ch. 31.

[*Other Acts Construed*]

In Ferguson v. Gies, 46 N. W. 718 (Mich. 1890), the Supreme Court of Michigan held that a penal statute similar to those in force in the District of Columbia, gave rise to a civil action for damages. That court said:

"The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen

under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places. It must be considered that when this suit was planted, the colored man under the law of this state, was entitled to the same rights and privileges in public places as the white man, and must be treated the same there; and that his right of action for any injuries arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen. This statute is only declaratory of the common law, as I understand it to now exist in this state."

See also: Everett v. Harron, 110 A.2d 383 (Pa., 1955) and Bolder v. Grand Rapids Operating Corp., 214, N. W. 241 (Mich., 1927).

In Fruechey v. Engleson, 43 N. E. 146 (Ind., 1896), the Court held that the plaintiff had a right to sue for a violation of a civil rights statute. This particular statute had a provision setting out a statutory penalty.

In Jones v. Kehrlein, et al., 194 Pac. 55 (Cal., 1920), the Court held valid a civil rights act. Although the act was penal in nature, it specified that civil damages might be recovered, and that damages awarded were not to be less than fifty dollars.

In Bailey v. Washington Theatre Co., et al., 34 N.E.2d 17 (Ind., 1941), the Court held that where the Act specified the maximum amount recoverable for violations of civil rights, such remedy is the exclusive remedy of the injured person. The Court said:

"We cannot agree with the appellant that the exclusion of a person from a theatre because of his race or color gives such a person a right of action under the common law of this state, nor can we agree that for the mere exclusion in such a case the person excluded can recover damages in an amount greater than the maximum fixed by the statute."

[*Federal Civil Rights Acts*]

In Agnew v. City of Compton, 239 F.2d 226 (9th Circ., 1957) the Court held that Sections 241 and 242 of Title 18, U.S.C.A., being criminal statutes, provides no basis for the civil suit. The Court then went on to discuss the civil rights sections in Title 42, U.S.C.A., Sections 1983 and 1985. The implications deducible from this case are that (1) Congress intended no civil action when it enacted the criminal statutes, or that (2) having created civil remedies in the Code, they are the exclusive foundations for civil relief. It should be noted that Congress passed two separate Acts on this subject. The criminal sections are derived from the Act of May 31, 1870, 16 Stat. 141, while the civil sections are derived from the Act of April 20, 1871, 17 Stat. 13, ch. 22.

In Stark v. First National Stores, Inc., 88 A. 2d 831 (Vt., 1952) the Court held the defendant liable for damages, but specifically excluded the use of the ordinance as a basis for liability. The Court said:

"The ordinance contains no provision that a civil action shall accrue to a person injured by another's breach of it, so none can be based on it alone."

The Court then discussed the negligence alleged in another count and pointed out that a violation of the ordinance could give rise to a prima facie case of negligence.

There are several cases in the District of Columbia which discuss the effects of regulations and ordinances as such, but none are decisive of the point in question.

[*Other Statutes Considered*]

There are cases in the Second Circuit which arrive at a contrary conclusion. In Goldstein v. Groesbeck et al. 142 F.2d 422 (1944), the Court held that a violation of the Public Utilities Holding Co. Act of 1935, 15 U.S.C.A., Sec. 79D (a) (2), gave rise to a civil cause of action on the part of the subsidiary company to recover back overcharges made by the parent. The Act declares such contracts void. The Court refused to rule on the question of the amount of damages, i. e., the full contract price, or only the excessive amount over and above the services rendered. This action could well have been sustained in the absence of the statute on the basis of unjust enrichment or money had and received.

In Fischman v. Raytheon Mfg. Co., et al., 188 F.2d 783 (1951) the Court sustained an action brought for the violation of the Securities and Exchange Act of 1934, Sec. 10 (b), 15 U.S.C.A., Section 78 J. The Court held that although the 1934 Act did not "explicitly author-

ize a civil remedy" it created such a remedy by making unlawful the conduct set out in the plaintiff's complaint. Again, the acts complained of amounted to an almost absolute case of fraud on the part of the defendants, and could well have been sustained on that issue alone.

[*Fitzgerald Case*]

In Fitzgerald et al. v. Pan American World Airways, Inc., 229 F.2d 499 (1956), the Court held that plaintiff was entitled to recover damages suffered as a result of discrimination. Plaintiff was en route from the United States to Australia on board one of defendant's planes. In Hawaii plaintiff was informed that she could not proceed further as a first class passenger, and was told that she could not reboard the plane for the continuation of her trip. Plaintiff relied on Sec. 404(b) of the Civil Aeronautics Act of 1938, 52 Stat. 993, 49 U.S.C. Sec. 484(b), which provides that no air carrier, etc., shall " . . . . subject any particular person . . . . to any unjust discrimination or undue or unreasonable prejudice or disadvantage in any respect whatsoever." Sec. 622(a) makes it a federal crime to "violate knowingly and wilfully," designated sections of the Act, including Sec. 484(b), (404(b) of the Act). The Court thought that the Act created a new federal right. The District Court dismissed the cause for lack of jurisdiction, holding that plaintiff's action was one for common law breach of contract and therefor diversity of citizenship was required. The Court of Appeals reversed and remanded on the grounds that a federal question was involved, and therefore no diversity of citizenship was required.

Reitmeister v. Reitmeister, 162 F.2d 693 (1947) was a suit based on a publication of plaintiff's phone calls to the defendant. The Court held that plaintiff had an action for damages based on Sec. 605 of the Communications Act of 1934, 47 U.S.C.A. Sec. 151, et. seq. The Court said:

> "Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."

On first impression this case appears to be an action based on an invasion of privacy. Yet the rule in New York is that the right of privacy was not protected at common law, but rather is a creature of statute, and to secure relief, recourse must be had to the statute. Fisher v. Murray M. Rosenberg, 23 N.Y.S. 2d 677 (1940). There being no federal common law of torts (Fitzgerald case, supra) the cause of action sustained in this case could only be predicated on the violation of the Federal Communications Act.

As to the above rulings in the Second Circuit, it should be pointed out that the primary purpose of each of the statutes in question was to regulate a specific field of industry or commerce to which each act was made applicable. They are not part of the criminal law of the country as such, but rather have been supplied with penal sanctions to assist in enforcement of the primary purpose.

[*1873 Act*]

A review of the Act of 1873 shows that no mention is made regarding the "color line". The only classification is that a person be respectable and well behaved. Failure to serve one of this description will result in a violation of the statute. In addition to this section, there are several other sections requiring the posting of prices in conspicuous places, and the submitting of a list of prices to the register of the District. The penalty for violation of any section of the statute is the same, i. e., failure to post prices, failure to submit list to proper official, or failure to serve proper persons.

Plaintiff contends that she is entitled to damages as a result of the defendant violating the section as to service. If she is entitled to damages for a violation of this section, she is also entitled to damages for a violation of any other section. She has to have a cause of action for damages based on defendant's failure to post the prices, or for failure to mail the list to the proper official, if her principal contention is correct. Yet it is very difficult to see how one could be injured in tort by a failure to meet all of the requirements of the statute, especially the part requiring the listing of prices with the proper official. Presumably one could post the prices, serve the individual, and neglect to mail the price list to the agency, and be liable over to an individual. The legislative assembly could never

have contemplated such a result, and yet the Act has to be read as a whole. For this reason, no civil action can be created for a violation of the Act in question.

[*1869 Act*]

The Act of 1869, as amended in 1870, presents a slightly different problem. As originally enacted, a penalty in the sum of twenty dollars was provided. It did not include such places as hotels, restaurants and barrooms. The 1870 amendment made the Act applicable to hotels, taverns, restaurants, etc., and also increased the penalty from twenty to fifty dollars, and provided that one-half of the penalty should be paid over to the informer in any such case.

Two questions are raised by this amendment. First, does the inclusion of a payment to the informer exclude all other remedies? See Bailey v. Washington Theatre Co., supra . . . The informer would not, in every instance, be the person injured, but there is little doubt that in the majority of the cases, such would be true. Second, is the question of the repeal of the 1870 Act, by either the 1872 or 1873 Acts of the Legislative Assembly? Since both acts deal with restaurants as a specific subject, it is most probable that the amendments in 1870 were repealed. In Post Civil War Ordinances, Georgetown Law Journal, Vol. 42, No. 2, at page 187, the following is set out:

> "The 1872 Act contained no express repeal provision. Nevertheless, if the 1872 Act applies to all facilities and uses of hotels, including lodging, it would seem clear that the 1870 Act was, insofar as hotels are concerned, impliedly repealed by the 1872 Act. Insofar as restaurants are concerned, the 1870 Act did not survive either the 1872 Act or the 1873 Act."

Another point to be decided is whether or not the Legislative Assembly or the common council could, expressly or impliedly pass acts that would create new causes of action, i. e., unknown at the common law. In Roach v. Van Riswick, MacArthur and Mackey Reports, pg. 171 (1879) the Court held that Congress could not delegate the power to enact general legislation. The authority of the local legislative bodies is not disputed to pass the acts in question, as long as they are penal in nature, but could they create a civil liability for a violation of the same where no action existed before? There are many definitions of general law and general legislation in Volume 18, Words and Phrases, at pages 342 et seq. None of these cases, however, assist in the instant case due to the unique status of the District of Columbia. There is no question but that the state legislatures can delegate self-government to certain localities. Such delegation is not unlawful and violative of the state constitutions. It is also undisputed that the local government cannot pass laws that have extra-territorial effect.

[*Delegation of Legislative Powers*]

In our case, the local Legislative Assembly was given legislative powers over the same area as that controlled by the Congress. How far then can Congress go in delegating legislative power? Certainly, a state legislature, constitutionally created, could not by statute create another body with general legislative functions for the whole state. To do so, would be tantamount to an abdication en masse, and an attempt to deprive the citizens of said state of their constitutional right to a legislature created by the constitution.

The same rule would apply to the Congress. They could delegate municipal functions, but could they abdicate entirely their right to legislate for the District? If the answer is no, then the legislative power of the local bodies becomes limited. General legislation is said to be that legislation that operates on all persons within a class or on all classes on a uniform basis.

The Act of 1869 is not uniform in that it had no effect outside of the City of Washington at the time of its passage. The Act of 1873 is uniform in that it applied to all of a class within the District of Columbia. It was sustained by the courts as a regulatory act. With this, there can be no argument.

In regards to the civil action, uniformity as such would not be the guiding rule in the District. The ultimate decision must be based on the power of the local government. Certainly, the city of Pittsburgh could not create a civil action that would or could be enforced as a result of an act committed in the city of Philadelphia. Enforcement of tort actions should be uniform throughout the state. Suppose the city of Providence, by annexation, eventually became geographically identical with the State of Rhode Island. You would then have the same situation

as we have in the District. Yet the State would still be a state, because of its constitutional status, and the city would still be subject to the mandates of the legislature. It could not enact legislation over subjects reserved to the State, nor could it overrule or repeal prior enactments of the legislature, or modify the state judicial system.

This argument is academic, but it points up the necessity of a rule such as handed down in the Roach case, supra, . . . A new cause of action, whether sounding in tort, or contract, is a matter of general legislation for the superior legislative bodies, or for creation of the same by the court system when the need therefor arises.

[*No Civil Cause of Action*]

It is the opinion of the Court that the municipal ordinance in question, which is regulatory in nature, does not give rise to a civil cause of action.

Assuming arguendo, that an ordinance does create a civil cause of action, is the plaintiff one within the class sought to be protected? The 1869 Act has the color line within its terms. The 1873 Act makes no mention of any particular class. Under the theory set out earlier, no liability for civil damages would arise unless the act were passed for a specific class. If the 1873 Act was passed for the benefit of the colored, then it could give rise to an action by a member of that class. However, the plaintiff herein is white. Since she is not within the class sought to be protected, she cannot rely on the act. If the act is applicable to any and all members of the community, then it becomes an act for the benefit of the city as an entity, and not for specific individuals.

The Court is of the opinion that the ordinance did not create a civil cause of action; but in any event, if it did create a civil cause of action, it could only be for the benefit of a specific class, a class to which the plaintiff does not belong.

Accordingly, the Motion to Dismiss is granted, and the Complaint is hereby dismissed for failure to state a cause of action upon which relief can be granted.

Appropriate entry to be made as of November 22, 1957.

PUBLIC ACCOMMODATIONS
Retail Stores—California

LAMBERT v. MANDEL'S

Appellate Department, Superior Court, Los Angeles County, California, December 13, 1957, 319 P.2d 469.

SUMMARY: The plaintiff brought an action in a California state court against the proprietor of a shoe store for damages for having been refused service. The complaint stated that the refusal of service was because the plaintiff was a member of the Negro race. The complaint was brought under the California "Civil Rights Act." The trial court dismissed the complaint. On appeal the Appellate Department reversed and remanded the case with directions. The Appellate Department held that a shoe store is within the class of places of public accommodation covered by the state act.

BISHOP, Presiding Judge

Plaintiffs complained because the defendant, operating stores where shoes were retailed, refused to serve the plaintiffs when they sought to buy shoes, the refusal being, as alleged, solely because of the fact that the plaintiffs were members of the Negro race. A general demurrer to the complaint was sustained without leave to amend. We are reversing the judgment of dismissal that followed, for we have concluded that the demurrer should have been overruled.

We need seek no further than section 51, of the Civil Code, and the cases interpreting it, for the applicable public policy of this State. That section reads: "All citizens within the jurisdiction of the State are entitled to the full and equal accommodations, advantages, facilities and privi-

leges of inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens." Section 52, Civil Code declares that a citizen denied any privilege vouchsafed by section 51, has an action for damages.

[*Shoe Stores Not Named*]

As a store retailing shoes is not one of the enterprises expressly mentioned in the section, and it obviously is not a place of amusement, our problem narrows down to this: Is a shoe store one of the "all other places of public accommodation"? The section is to be given a liberal, not a strict, construction (see Orloff vs. Los Angeles Turf Club (1947), 30 Cal. 2d 110, 113, 180 Pac. 2d 321, 322-323). In Evans vs. Fong Poy (1941), 42 Cal. App. 2d 320, 321. The words we have quoted above in this paragraph were given emphasis and the court declared: "Such sweeping language as that italicized obviously covers public bars or saloons." This sweeping language does not cover "all places," however. In Long vs. Mountain View Cemetery Assn. (1955), 130 Cal. App. 2d 328, 329, 278 Pac. 2d 945, 946, it was held not to cover a mausoleum, one of three, operated by the defendant, the one set aside for the exclusive use of members of the Caucasian race. In reaching this conclusion the court recognized that "The settled rule of law is that the expression 'all other places' means all other places of a like nature to those enumerated" but concluded that mausoleums were not of a like nature. Applying the same test, in Coleman vs. Middlestaff (1957), 147 Cal. App. 2d 833, 834-835, 305 Pac. 2d 1020, 1021-1022, we found a dentist's office not to be a place of a like nature to those specifically referred to in the section.

[*Construction of "All Other Places"*]

The test—of a like nature—would be, of course, unworkable if the place in question had to be like each of those mentioned in the section for they are too diverse to have a common, pertinent, characteristic, other than that of being a place of public accommodation. When the question is presented: is a place not mentioned specifically in section 51 included by its reference to "all other places"? an affirmative answer is to be given if it is a place of public accommodation and it is like one or more of those mentioned. Hence a saloon, although not like a public conveyance (of one of those listed) is included in the "all other places," because it is like a restaurant, and a place selling soft drinks, not alike in all particulars, but alike in sufficient essential characteristics to warrant the conclusion that the legislature meant to cover it. Webster defines "accommodation" as "whatever supplies a want or affords ease, refreshment, or convenience; anything furnished which is desired or needful." A retail shoe store is a place of public accommodation that is essentially like a place where ice cream and soft drinks are sold; each is open to the public generally for the purchase of goods. It cannot be argued that either is not a place of public accommodation because the proprietor undertakes to limit his patrons to those of the white race, for it is this discrimination that the law condemns. The fact that the defendant, in this case, sells shoes and neither ice cream nor soft drink, does not serve to distinguish its services, at the point of importance, from those of the vendor of refreshments.

The judgment of dismissal is reversed with directions to the trial court to overrule the demurrer to the complaint. The appeal from the order of July 26, 1957, sustaining the demurrer without leave to amend is dismissed. Appellants are to have their costs on appeal.

We concur: Swain, Judge; Kauffman, Judge.

PUBLIC ACCOMMODATIONS
Skating Rinks—Pennsylvania

S. Amos BRACKEEN et al. v. Hyatt RUHLMAN individually and trading as the Lexington Roller Skating Palace et al.

Court of Common Pleas, Allegheny County, Pennsylvania, October 19, 1957, No. 1526, January Term, 1954.

SUMMARY: Having been denied admission to the defendant's skating rink, ostensibly because they were not "members" of the club operating the rink, the plaintiffs, Negroes, brought an action in a Pennsylvania state court to enjoin the denial of admission. The basis of the action was that admission had been denied because of the race or color of the plaintiffs, that the "membership" requirement was a subterfuge and that the skating rink was a "place of public accommodation or amusement" within the state's "Civil Rights Law."[a] The court found the skating rink to be a place of public amusement within the act and issued the injunction.

O'BRIEN, J.

ADJUDICATION
THE PLEADINGS AND ISSUES

The plaintiffs filed a Complaint against the defendant praying for a Preliminary Injunction. The plaintiffs allege the defendant denied them and all other colored persons admission to the skating Rink owned and operated by the Defendant as a public place of amusement. The plaintiffs further charge the defendant with violations of Section 654 of the Act of June 24, 1939, P.L. 872.

A rule to show cause why a Preliminary Injunction should not issue as prayed for was granted on the plaintiffs' motion.

The defendant filed Preliminary Objections

a. Section 654 of the Pennsylvania Penal Code, 18 Purdon's Penna. Statutes, Anno., Sec. 4654, provides: § *4654. Discrimination on account of race and color*

(a) All persons within the jurisdiction of this Commonwealth shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of any places of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. Whoever, being the owner, lessee, proprietor, manager, superintendent, agent or employe of any such place, directly or indirectly refuses, withholds from, or denies to, any person, any of the accommodations, advantages, facilities or privileges thereof, or directly or indirectly publishes, circulates, issues, displays, posts or mails any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such places, shall be refused, withheld from, or denied to, any person on account of race, creed, or color, or that the patronage or custom thereat of any person belonging to, or purporting to be of, any particular race, creed or color is unwelcome, objectionable or not acceptable, desired or solicited, is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine of not more than one hundred dollars ($100), or shall undergo imprisonment for not more than ninety (90) days, or both.

(b) The production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any person being the owner, lessee, proprietor, superintendent or manager, thereof, shall be presumptive evidence in any civil or criminal action that the same was authorized by such person.

(c) A place of public accommodation, resort or amusement, within the meaning of this section shall be deemed to include inns, taverns, roadhouses, hotels, whether conducted for the entertainment of transient guests, or for the accommodation of those seeking health, recreation or rest, or restaurants or eating houses, or any place where food is sold for consumption on the premises, buffets, saloons, bar-rooms, or any store, park, or inclosure where spirituous or malt liquors are sold, ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations, or their derivatives, or where beverages of any kind, are retailed for consumption on the premises, drug stores, dispensaries, clinics, hospitals, bath-houses, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of this Commonwealth, garages and all public conveyances operated on land or water, as well as the stations and terminals thereof.

(d) Nothing contained in this section shall be construed to include any institution, club or place or places of public accommodation, resort or amusement, which is or are in its or their nature distinctly private, or to prohibit the mailing of a private communication in writing sent in response to a specific written inquiry. 1939, June 24, P.L. 872, § 654.

averring therein the lack of jurisdiction of the court.

The parties agreed at the suggestion of the court at the time of hearing on the Preliminary injunction that a full hearing be had, and, if necessary, all testimony taken be made of record as the testimony as upon a final hearing.

The parties agreed, including the Potter Bank and Trust Company, Executor of the Estate of Hyatt Ruhlman, by stipulation filed of record and order of court that by reason of the death of the defendant, Hyatt Ruhlman, the Executor of his estate, the Potter Bank and Trust Company, be substituted as defendant in this action and the proceedings herein continue as if the said executor of his estate were the original defendant subject to such orders and decrees as the court shall hereafter make.

The court dismissed the Preliminary Objections of the defendant and ordered the defendant to file an answer to the complaint. The defendant filed its answer to the complaint.

The general issue for determination is whether members of the colored race have been denied admission to the Lexington Roller Skating Palace.

FINDINGS OF FACT

1. The plaintiffs' action is predicated on the Penal Code of the Commonwealth of Pennsylvania Act of June 24, 1939, P.L. 872, Section 654. (18 Purdon Statutes, Section 4654)

2. The Lexington Skating Club is located at Broad Street and Larimer Avenue and consists of a main skating floor, approximately 226′ x 96′ with a maple floor; a Beginners Room 30′ x 70′; a refreshment stand, a skate room, a ladies and gentlemen's rest room with all modern conveniences, and the corridor into the Rink carpeted the full length.

[*Formation of Club*]

3. The Lexington Skating Club was formed in 1946 for the purpose of keeping out all persons of objectionable character and conduct, without regard to race, color or creed, and eliminating the rougher element after a serious riot ensued at the Rink and for the further purpose of advancement of more refined roller skating by all.

4. This Club has been in continuous existence since said date and now has a membership of approximately thirty thousand members whose names are kept of record by steel addressograph plates. Records, minutes and books are kept of this organization and the said membership list together with the above records were produced in court.

5. All rules as to proper dress, conduct and skating are promulgated by the Lexington Skating Club and no provision of the rules, regulations or by-laws of the Lexington Skating Club discriminates against any applicant because of race, color or creed.

6. The Lexington Skating Club in carrying out its purposes produces an annual program known as the "High Hat Revue" consisting of various skating activities by members of said club and the profits, or part of the profits, are given to charity.

7. The Lexington Skating Club is a member of the Roller Skating Rink Operators Association of America which includes all the well kept Rinks in the United States and Canada and is the governing body of the roller skaters in any act presented under the sanction of said association.

8. The Lexington Skating Club issues a special paper called "Lextra" publishing club activities and is edited by the club secretary, Mrs. Edna Betz. The club also prepares entrants for the County, State, Regional and National championship wherein the best skaters from various districts throughout the country compete. The expenses of any candidate from the Lexington Skating Club is borne by the treasury of the said club.

[*Memberships*]

9. Fifteen thousand membership cards and fifteen thousand application cards were printed on July 1, 1947 on order from Mrs. Edna Betz, the club secretary. This was not the first order for printing, but was the earliest record of the printer. The printing of said membership cards was admitted by stipulation between counsel for the defendant and plaintiffs.

10. In the entrance way of the Lexington Roller Skating Palace are two booths, the membership booth and the cashiers booth, in which booths are large placards reading "Admission by Club Membership Only".

11. On occasions applications for membership

were given to colored people who were advised to have two recommenders sign the same and return the application to the Lexington Skating Club for action. However, no application by a colored person for club membership has been returned.

12. Applications for membership by people of the white race were rejected by the membership committee but the same was not denied because of race, color or creed.

[*Non-Members Admitted*]

13. On April 18, 1953, Mrs. Gladys Golightly, a white person, visited the Lexington Roller Skating Palace, operated by the defendant, and was sold a spectator's ticket for Forty Cents ($.40) although she was not a member of the Lexington Roller Skating Club.

14. On April 18, 1953, Mrs. Helen Garden Barnes, a white person, went to the said roller skating Rink accompanied by Jane Wright, age 20, Jean Banker, age 21, and Donald Staley, age 17, all white persons. Donald Staley bought three admission tickets for the other young people and they all went inside as did Mrs. Barnes who had no ticket. None of these persons were members of the Lexington Skating Club.

[*Negroes Rejected*]

15. On April 18, 1953, Reverend S. Amos Brackeen, a colored minister, went to the said skating Rink. He was told by a person in one of the booths that he had to be a member of the said club to be admitted to the roller Rink. He was given a membership application to the Lexington Skating Club.

16. On April 18, 1953, Marion B. Jordon, a colored person, Executive Secretary of the Local Branch of the National Association for the Advancement of Colored People, was denied admission and told that she must be a member of the Lexington Skating Club to be admitted.

17. On October 13, 1953, Stephen E. Howard, a colored person, accompanied by two young colored girls, was denied admission and given membership application cards to the Lexington Skating Club after which time they left the premises.

18. On October 22, 1953, J. Paris Griffin, a colored person, went to the Rink with a friend, Raymond Walls, also colored. Mr. Griffin was told he needed to have a membership in the Lexington Skating Club and was given an application card. He was not asked whether he was a member but was told immediately by a person in one of the booths that he needed a membership card for admission to the roller Rink. Neither he nor Mr. Walls were admitted.

[*Memberships Obtained Quickly*]

19. George Nash, age 21, a white person, went to the Rink on three occasions. On October 1, 1953, he bought a ticket for One Dollar and Seven Cents ($1.07) and was admitted although he was not a member of the Lexington Skating Club. On October 22, 1953, he filled out an application card for admission to the Lexington Skating Club and paid an admission fee of One Dollar and Seven Cents ($1.07) and was admitted to the roller Rink within a period of three minutes.

20. On November 6, 1953, Charles C. Holt, a white person, was given an application card for membership in the Lexington Skating Club to which he signed his name and was immediately given a membership card in the said club. He paid the admission charge and was admitted to the roller Rink and skated therein. It required about twenty seconds for him to secure a membership card in said club at the entrance to the roller Rink.

21. Jenny Lee Braddock, a white person, age 22, went to the Rink with another white girl on November 14, 1953. Each girl was permitted to enter the Rink after filling out the membership card and placing the other's name upon the application as the one recommending membership although neither one was a member of the Lexington Skating Club on that date.

22. On November 18, 1953, the aforesaid Mrs. Golightly again visited the roller rink and was told by a person in one of the booths that she could purchase a ticket of admission to the Rink although she was not a member of the Lexington Skating Club at the time.

[*Control of Club*]

23. Hyatt D. Ruhlman was the sole registered owner of the Lexington Roller Skating Rink and

Lexington Amusement Company which operated the roller skating rink at Broad Street and Larimer Avenue, Pittsburgh, Allegheny County, Pennsylvania.

24. A fictitious Name registration was filed in the Prothonotary's Office of Allegheny County on June 1, 1945 being No. 27557 and recorded in the Fictitious Names Docket of Allegheny County in Vol. 86, page 147, which certificate contains the following paragraph one:

> "The real name or names and addresses of all persons owning or interested in said business is or are names, Hyatt D. Ruhlman, residence, 109 Stratford Avenue, Pittsburgh, Pennsylvania."

Paragraph two:

> "The name, style or designation under which said business is being or will be carried on or conducted is the Lexington Amusement Company."

Paragraph three:

> "The character of the business so carried on or conducted is owning, maintaining and operating places of public amusement, recreation and entertainment."

Paragraph four:

> "The place where said business is to be carried on or conducted is Broad Street and Larimer Avenue, Pittsburgh, Pennsylvania."

Paragraph five:

> "The name of the agent, if any, through which said business is to be carried on or conducted in the said County of Pennsylvania, with his address is, none."

Paragraph six:

> "The signatures of all parties interested follow: Hyatt D. Ruhlman." (The signature "Hyatt D. Ruhlman" is thereon.)
> The certificate is sworn to before Ralph C. Water, Alderman, on May 25, 1945, by Hyatt D. Ruhlman.

25. No Negroes, or colored persons, were admitted to membership in the Lexington Skating Club.

26. The persons who were members of the Lexington Skating Club paid no dues nor were any dues charged or assessed to them.

27. The operation and control of the Lexington Skating Club was exercised by the defendant, Hyatt D. Ruhlman, by his agent and employee, Mrs. Edna Betz, and any other person chosen by the defendant to conduct the affairs of the club.

28. The defendant, Hyatt D. Ruhlman, was the sole owner and controlled the Lexington Roller Skating Palace and/or the Lexington Amusement Company and the Lexington Skating Club.

29. The Lexington Skating Club is used by the defendant to exclude Negroes, or colored persons, from admission to the Lexington Roller Skating Palace, although the club system was originally devised in 1946 to exclude undesirable persons rather than by reason of race or color.

30. The Lexington Roller Skating Palace is a place of public amusement and accommodation which charges for admission and is not a private recreation club.

31. The plaintiffs were denied admission to the Lexington Roller Skating Palace by reason of being colored or Negroes and not by reason of any objectionable personal characteristic.

DISCUSSION OF THE QUESTIONS OF FACT AND LAW INVOLVED

The defendant's testimony sought to establish that the Lexington Skating Club was a bona fide roller skating association or club. The facts determined from the credible evidence clearly indicates that it was a device to exclude colored people from admission to the Lexington Roller Skating Palace. The so-called club possessed none of the attributes of a club in the legal sense that it was owned, operated and controlled by and for its members and for the membership. There is no doubt about the applicable law of our Commonwealth and that of many other states as well as the federal government that the erection of any organization, scheme or plan solely for the elimination or denial of any person on account of race, creed or color to any place of public accommodation is unlawful and against the public policy.

It is now well settled that equity is available to protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction and it has been specifically held that persons against whom illegal

discrimination is practiced have a right to equitable relief by way of injunction under Section 654 of the Penal Code of 1939 P.L. 872. See Everett v. Harron, 380 Pa. 123.

It is abundantly clear from the credible evidence in the within matter that the manner in which the defendant operated its establishment, trading as an individual, could not exclude persons on account of race, creed or color within the frame work of the law as it presently exists since the enactment of Section 654 of the Penal Code of 1939 P.L. 872. The philosophy of our law, as enacted by the statutes and the decisional law of our appellate courts, has been set forth for us by the case of Everett v. Harron, supra, and the citations contained therein.

It is interesting to note the case of In the Matter of Castle Hill Beach Club, Inc. Appellant, v. Ward B. Arbury, et al., Respondents, New York Reports, Court of Appeals, 2, Second Series, page 596, decided April 11, 1957. In the New York case the scheme of club operation was resorted to for the purpose of excluding colored persons which was held to be a violation of the New York law.

CONCLUSIONS OF LAW

1. The Lexington Roller Skating Palace and/or the Lexington Amusement Company is operating a place of public accommodation within the meaning of the Act of June 24, 1939, P.L. 872, Section 654.

2. The defendant's use of the device known as the Lexington Skating Club for denying admission to Negroes, or colored people, solely on account of race or color, is in violation of the said Act of 1939 P.L. 872, Section 654.

3. The Act of 1939 P.L. 872, Section 654, confers upon Negroes and others a civil right enforceable in equity to be admitted to any places of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons.

4. Equity has jurisdiction to enjoin the violations of the Act of 1939 P.L. 872, Section 654, as determined by the findings of fact herein. The defendant is to pay the costs.

DECREE NISI

And now, to wit, October 19, 1957, after hearing, consideration, findings of fact and conclusions of law, it is hereby ordered and decreed that an injunction issue forthwith enjoining the defendant, Potter Bank and Trust Company, executor of the Estate of Hyatt Ruhlman, deceased, substituted defendant of Hyatt Ruhlman, deceased, who individually and trading as the Lexington Roller Skating Palace and/or the Lexington Amusement Company, and restraining it from denying the plaintiffs, S. Amos Brackeen, Marion B. Jordon, Lavon Shelton and Jeannette Shelton, a minor, Alex Shelton, her guardian, Stephen Howard, Jr., and all other colored persons, or Negroes, admission to the said Lexington Roller Skating Palace and/or the Lexington Amusement Company Rink, or any portion thereof, on account of race and color and from any further violations of the Act of June 24, 1939, P.L. 872, Section 654.

HOUSING

Private Housing—Pennsylvania

COMMONWEALTH of Pennsylvania v. Eldred WILLIAMS et al.

Court of Common Pleas, Bucks County, Pennsylvania, October 23, 1957, No. 8, September Term, 1957.

SUMMARY: Following the purchase by a Negro of a dwelling house in Levittown, Pennsylvania, demonstrations and disorders occurred in the neighborhood. County officials petitioned in the county Court of Common Pleas for a restraining order against eight named persons to prevent them from demonstrating against or intimidating the Negro family or other residents of Levittown. A preliminary injunction was granted against the named defendants restraining them from such acts. [The complaint filed by the Commonwealth is set out preceding the injunction.]

Complaint In Equity

1. The plaintiff is the Commonwealth of Pennsylvania.

2. The named defendants are:
Eldred Williams, 20 Dewberry Lane, Levittown, Bucks County, Pennsylvania.
James E. Newell, 94 Daffodil Lane, Levittown, Bucks County, Pennsylvania.
Howard H. Bentcliffe, 90 Dogwood Drive, Levittown, Bucks County, Pennsylvania.
Mrs. Agnes Bentcliffe, 90 Dogwood Drive, Levittown, Bucks County, Pennsylvania.
John R. Bentley, 21 or 41 Autumn Lane, Levittown, Bucks County, Pennsylvania.
David L. Heller, 14 Darkleaf Lane, Levittown, Bucks County, Pennsylvania.
John Thomas Piechowski, 9 Cliffe Road, Cobalt Ridge, Levittown, Bucks County, Pennsylvania.
Mrs. John Barbazon, 153 Dogwood Drive, Levittown, Bucks County, Pennsylvania.

3. On or about August 10, 1957, William E. Myers, Jr. and his wife, Daisy D. Myers, Negroes, purchased a house at 43 Deep Green Lane, Levittown, Bucks County, Pennsylvania, and shortly thereafter, with their three minor children, moved into the house and have continued to reside there.

4. On or about August 13, 1957, and continuing to the present time, the defendants entered into an unlawful, malicious and evil conspiracy with each other and with other persons unknown to the plaintiff, the purposes of said conspiracy being:

(a) to force the said Myers family to leave Levittown;
(b) to harass, annoy, intimidate, silence and deprive of their rights to peaceable enjoyment of their property residents of Levittown who did not participate in the conspiracy or in any act designed to force the said Myers family to leave Levittown;
(c) to deprive the said Myers family and other residents of Levittown of their rights to personal security and equal protection of the laws;
(d) to interfere with and prevent law enforcement officers from performing their duties with the intent to deny the aforesaid residents of Levittown of the equal protection of the laws;

said conspiracy and said purposes being in violation of the Constitution of the United States and the Federal Civil Rights Act, R. S. § 1980, 42 USC § 1985, enacted pursuant thereto, and the Constitution and laws of the Commonwealth of Pennsylvania.

5. In furtherance and pursuance of said conspiracy and with intent to make said conspiracy effective, defendants, in cooperation with other persons unknown to the plaintiff, committed the following acts, all of which were in violation of the Constitution of the United States and the Federal Civil Rights Act enacted pursuant thereto and the Constitution and laws of the Commonwealth of Pennsylvania.

(a) Defendants instigated, organized and participated in a mob demonstration in the vicinity of 43 Deep Green Lane, Levittown, on or about August 13, 1957, at which time insults were uttered, threats were made, stones were hurled and windows were broken.

(b) Defendants instigated, organized and participated in a series of meetings and mob demonstrations continuing from August 13, 1957, to the present time. At these meetings and demonstrations insulting, inflammatory and degrading remarks were directed against Myers and other residents of Levittown who were not in sympathy with this conspiracy; threats of personal violence and property damage to such persons were made.

(c) On or about the week of August 13, 1957, to August 20, 1957, in response to a rumor that a house in the North Park section of Levittown had been sold to a Negro, defendants incited, instigated and caused the painting and damaging of a vacant house in the North Park section.

(d) Defendants incited, instigated, promoted and participated in a mob demonstration on or about August 20, 1957, in the vicinity of 43 Deep Green Lane at which time a stone was thrown seriously injuring policeman, Sergeant Thomas Stewart.

(e) Defendants instigated, incited and aroused mob demonstrations at which times the members of the mob uttered taunts, scurrilous and disrespectful remarks to the police officers

on duty in an attempt to obstruct and impede the proper enforcement of law.

(f) On or about the night of September 5, 1957, defendants incited, instigated and caused the burning of a cross in front of the house of Louis Wechsler, 39 Deep Green Lane, Levittown, which house is adjacent to that of the said Myers family.

(g) On or about the night of September 22, 1957, the defendants incited, instigated and caused the burning of a cross in the front of the home of Peter Von Blum, 96 Village Lane, Levittown.

(h) On or about the night of September 24, 1957, the defendants incited, instigated and caused the burning of a cross in the front of the home of John M. Preston, 83 Dogwood Drive, Levittown.

(i) On or about September 24, 1957, defendants instigated, incited and caused the placing on the diningroom window of the home of the aforesaid John M. Preston a manila envelope on which was lettered the following message: "Preston—You and Lafferty Beware! Keep your Big Mouth Shut. The KKK Has Eyes. We Know your Every Move—Keep Your Mouth Shut".

(j) On or about 4:00 a.m., September 25, 1957, the defendant, Howard H. Bentcliffe, painted on the house of Louis Wechsler, 39 Deep Green Lane, the letters "KKK" in red paint.

(k) On or about 4:00 a.m., September 25, 1957, defendants, without permission of the owner and in violation of law, incited, instigated and caused a poster entitled "Conquer and Breed" to be affixed to the house of Louis Wechsler, 39 Deep Green Lane, Levittown. A copy of said poster is attached hereto and marked "Exhibit A".

(l) On or about the night of September 4, 1957, defendants incited, instigated and caused three milk bottles filled with inflammable gasoline and turpentine, fitted with wads of cotton and covered with tinfoil, to be placed on the premises of Stephen Toth, 93 Dogwood Drive, Levittown.

(m) From September 22, 1957, up to and including September 26, 1957, defendants incited, instigated, organized and attended gatherings at 3 Evergreen Lane, which is directly behind the home of the said Myers family and which has a common boundary with the Myers property. At these gatherings records were played loudly day and night and bright lights were turned on late at night.

(n) On or about the evening of October 13, 1957, defendants incited, instigated and caused a smoke bomb to be placed on the common boundary between the properties of William Myers and Louis Wechsler in Levittown.

(o) On or about August 13, 1957, and continuing intermittently to the present time, defendants incited, instigated, organized and caused caravans of automobiles bearing Confederate flags to drive past the homes of the said Myers and of other residents of Levittown both day and night causing fear of violence, creating noise and disturbance and preventing the residents of the vicinity from resting at night.

(p) On or about August 13, 1957, and continuing intermittently to the present time, the defendants have incited, instigated and organized a course of conduct participated in by the said defendants and other persons whose identities are unknown designed to harass, annoy and disturb the peace of the community. Said conduct includes, without limitation: (a) calling dogs "nigger" and summoning them in a loud tone of voice in the vicinity of the home of the said Myers; (b) driving cars with radios turned on at top volume around the neighborhood late at night and in the very early morning; (c) walking back and forth in the neighborhood hurling insults and invective in a loud tone of voice; (d) walking or driving through the neighborhood playing musical instruments excessively loudly; (e) loud and repeated banging of the mailbox at the corner of Daffodil Lane and Daisy Lane in Levittown, which is in close proximity to the home of the said Myers family; (f) numerous harassing anonymous phone calls to William Myers and to other residents of Levittown who had not joined in the aforesaid conspiracy, the callers threatening that the homes of the persons called would be bombed and their children would be harmed.

(q) Defendants incited, instigated and caused certain advertisements to be placed in the Levittown Times-Bristol Courier. Said advertisements denounce Negroes for moving to Levittown, urge the readers to keep Levittown an all-white community and incite the readers "not to stand by and see the Dogwood incident (the purchase of a home by a Negro) repeated". Copies are attached hereto and marked "Exhibit B1 and Exhibit B2".

(r) Defendant Eldred Williams and other defendants solicited residents of the area to join the Ku Klux Klan and distributed applications for "Citizenship in the Invisible Empire Knights of the Ku Klux Klan", a copy of which is attached and marked "Exhibit C".

(s) Defendants have repeatedly and continuously, from approximately August 13, 1957, up to and including the present time, distributed and disseminated inflammatory printed matter, some of it bearing the name of the Ku Klux Klan, designed to inflame the public, foment violence and strife and cause damage to the person and property of said Myers and of other residents of Levittown. Among the literature distributed are the aforementioned poster "Conquer and Breed", the leaflet "Eternal Truth", and other pictures and flyers, copies of which are attached hereto and marked "Exhibit D".

(t) Defendants instigated, incited and caused the making of threats to blow up, burn and destroy any house in Levittown which is sold to a Negro.

(u) Defendants have instigated, incited and caused the making of threats to blow up, burn and destroy the house of the said Myers family on Hallowe'en, 1957. Mischief night, which is a customary part of the Hallowe'en activities, is usually celebrated on the weekend preceding Hallowe'en, i.e., commencing Friday, October 25, 1957.

6. On or about August 13, 1957, and continuing to the present time, the activities of the mobs incited by the defendants and the threats of violence have been so serious and continuous as to require constant police protection in the vicinity of 43 Deep Green Lane, Levittown. On or about August 14, 1957, and continuing until approximately August 20, 1957, and on or about September 16, 1957, and continuing until the present time, the State Police have been on constant duty in the vicinity of 43 Deep Green Lane, Levittown, to protect life and property and to preserve the public peace.

7. No adequate remedy at law is available to prevent irreparable damage. A multiplicity of actions would be required to prevent these continuing and threatened acts of violence, nuisances and violations of law to the detriment of the public and the rights of private individuals.

WHEREFORE, the Commonwealth requests the court to grant a preliminary injunction and to enter a decree enjoining the defendants and all other persons acting in concert or in cooperation with them from doing any of the following acts:

(a) burning or causing to be burned fiery crosses;

(b) soliciting among the residents of Levittown membership in the Ku Klux Klan;

(c) trespassing and affixing to the property of others or distributing on private property of others or littering the streets and public areas with inflammatory posters scurrilous pictures, leaflets and other printed matter, and literature of the Ku Klux Klan;

(d) harassing or annoying the residents of Levittown by organizing, instigating or participating in motorcades, loud slamming of mail boxes, loud summoning of dogs by the appellation "nigger", setting off fire crackers;

(e) placing or causing to be placed in Levittown bombs or explosives of any kind whatsoever;

(f) in any manner threatening or intimidating any individual, or in any manner threatening the destruction of property;

(g) taking any acts of any kind whatever which seek by force, violence or intimidation to compel the removal or withdrawal of the said Myers from Levittown or by force, violence or intimidation to prevent the sale of any property in Levittown to any Negro; and

(h) to grant such other relief as the Court shall deem appropriate.

And your petitioner will ever pray.

s/ Louis G. Forer
Deputy Attorney General
s/ Thomas D. McBride
Attorney General
Attorneys for the
Commonwealth.

Preliminary Injunction Issued

SATTERTHWAITE, J.

DECREE

AND NOW, October 23, 1957 upon presentation of the Complaint in the above matter and upon full consideration of the matter thereof, and, it appearing to the Court that immediate and irreparable injury would result if the matters complained of are permitted to continue, it is hereby adjudged and decreed that Eldred Williams, James E. Newell, Howard H. Bentcliffe, Mrs. Agnes Bentcliffe, John R. Bentley, David L. Heller, John Thomas Piechowski and Mrs. John Barbazon, and all other persons acting in concert or cooperation with them be, and they hereby are, enjoined from doing any of the following acts until further order of the Court:

(a) burning or causing to be burned fiery crosses;

(b) trespassing and affixing to the property of others or distributing on private property of others or littering the streets and public areas with inflammatory posters, scurrilous pictures, leaflets and other printed matter,

(c) harassing or annoying the residents of Levittown by organizing, instigating or participating in motorcades, loud slamming of mail boxes, loud summoning of dogs by the appellation "nigger", setting off fire crackers,

(d) placing or causing to be placed in Levittown bombs or explosives of any kind whatsoever,

(e) in any manner threatening or intimidating any individual, or in any manner threatening the destruction of property,

(f) taking any acts of any kind whatever which seek by force, violence or intimidation to compel the removal or withdrawal of the said Myers from Levittown or by force, violence or intimidation to prevent the sale of any property in Levittown to any Negro.

RULE TO SHOW CAUSE

AND NOW, to wit, this 23rd day of October, 1957, on motion of Thomas D. McBride, Attorney General, and Lois G. Forer, Deputy Attorney General, a rule is entered upon the defendants to show cause why the preliminary injunction this day entered should not be continued against them.

Rule returnable Monday, the 28th day of October, 1957, at 10 A.M., Main Court Room, Doylestown, Pennsylvania.

DECREE

AND NOW, to wit, this 28th day of October, 1957, upon the agreement of all parties in interest, all of them being represented by counsel or being present in person, upon motion of Thomas D. McBride, Attorney General, and Lois G. Forer, Deputy Attorney General, attorneys for the Commonwealth of Pennsylvania, and upon full consideration thereof, it is ordered, adjudged and decreed that the Preliminary Injunction entered by this Court on October 23, 1957, against

Eldred Williams, 20 Dewberry Lane, Levittown, Bucks County, Pennsylvania.
James E. Newell, 94 Daffodil Lane, Levittown, Bucks County, Pennsylvania.
Howard H. Bentcliffe, 90 Dogwood Drive, Levittown, Bucks County, Pennsylvania.
Mrs. Agnes Bentcliffe, 90 Dogwood Drive, Levittown, Bucks County, Pennsylvania.
John R. Bentley, 21 or 41 Autumn Lane, Levittown, Bucks County, Pennsylvania.
David L. Heller, 14 Darkleaf Lane, Levittown, Bucks County, Pennsylvania.
John Thomas Piechowski, 9 Cliffe Road, Cobalt Ridge, Levittown, Bucks County, Pennsylvania.
Mrs. Mary Barbazon, 153 Dogwood Drive, Levittown, Bucks County, Pennsylvania.

be and the same is continued in full force and effect until the final hearing of this case or until further order of this court.

TRANSPORTATION
Buses—Alabama

Martin Luther KING, Jr. v. The STATE of Alabama

Court of Appeals of Alabama, April 30, 1957, 98 So.2d 443.

SUMMARY: The appellant was indicted,[a] tried and convicted in an Alabama state court on conspiracy charges arising out of a boycott of buses in Montgomery, Alabama. An appeal of the conviction to the Alabama Court of Appeals was dismissed because the transcript of evidence in the trial was filed too late.

CATES, Judge.

M. L. King, Jr., on March 22, 1956, gave notice of appeal from a judgment of guilt and sentence passed upon him that day by the Montgomery Circuit Court.

On September 13, 1956, the Attorney General filed here a motion (1) to strike the transcript of evidence; (2) to strike the transcript of the record; and (3) to dismiss the appeal.

The defendant not having moved for a new trial, Act No. 97, approved February 9, 1956, Acts 1956, 1st Sp.Sess., p. 143, required the court reporter to file the transcript of evidence with the circuit clerk within sixty days after the taking of the appeal, i.e., on or before May 21, 1956. Neither we nor the trial court were asked to extend the time. Therefore, the filing by the reporter with the circuit clerk on July 31, 1956, was too late. Code 1940, Title 7, § 827(1) et seq.; Clark v. State, Ala.App., 82 So.2d 805.

The filing of the transcript of the record with the clerk of this court on August 10, 1956, without benefit of an order of extension was also too late. Having allowed the sixty days to file the transcript of evidence with the circuit clerk to lapse, the defendant's sixty days under Supreme Court Rule 37, as amended (263 Ala. xxi), Code 1940, Tit. 7 Appendix, began to run March 22, 1956, and expired midnight May 21-22, 1956. Lane v. State, Ala.App., 87 So.2d 668; Duke v. State, 264 Ala. 624, 89 So.2d 102. Code 1940, Title 7, § 769, does not operate here and Supreme Court Rule 48 is without influence. See Watkins v. Kelley, 262 Ala. 524, 80 So.2d 247.

The motion of the Attorney General is granted. Ordered that the record including the transcript of evidence be stricken and the appeal be dismissed.

Motion granted; record stricken; appeal dismissed.

ON REHEARING

The writer entertains the view that, where, as here, no motion for a new trial is made, no extension of time is sought from the trial judge, and the transcript of testimony is not forthcoming in the 60 days running from the notice of appeal, the 60 days of Supreme Court Rule 37 for the bringing of the entire record here runs concurrently with the 60 days under Act No. 97, supra.

HARWOOD, P. J., and PRICE, J., consider this conclusion unnecessary for decision because the filing here of the record proper on August 10, 1956, some 141 days after notice of appeal, was too late under any interpretation.

Application Overruled.

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a. The indictment read:

"THE STATE OF ALABAMA
MONTGOMERY COUNTY

Circuit Court of Montgomery County, February Term, A. D. 1956

The Grand Jury of said County charge that, before the finding of this indictment, M. L. King, Junior, Roy Bennett, E. N. French and E. D. Nixon, each of whose names is to the Grand Jury otherwise unknown, did, without a just cause or legal excuse for so doing, enter into a combination, conspiracy, agreement, arrangement, or understanding for the purpose of hindering, delaying, or preventing Montgomery City Lines, Inc., a corporation, from carrying on a lawful business, to-wit: the operation of a public transportation system in the City of Montgomery, Alabama, against the peace and dignity of the State of Alabama.

/s/ William S. Thetford
Solicitor Fifteenth Judicial
Circuit of Alabama"

EMPLOYMENT
Labor Unions—Federal Statutes

Bennie L. WHITFIELD et al. v. UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2708, et al.

United States District Court, Southern District, Texas, November 20, 1957, 156 F.Supp. 430.

SUMMARY: Negro members of an integrated local of the United Steelworkers in Houston, Texas, brought a class action in federal district court against the local and its officers and the employer. The action sought a declaratory judgment, an injunction and damages. The plaintiffs contended that an agreement entered into by the local and the employer discriminated against Negro employees through the use of two "lines of progression" in promotion policies. The court found that Negroes participated freely in union affairs and that the promotion policies reflected reasonable industry practices and were not discriminatory in themselves nor applied in a discriminatory manner. A decision in favor of the defendants was rendered.

INGRAHAM, District Judge

This is a class suit brought by five plaintiffs for themselves and others similarly situated for declaratory judgment, permanent injunction and damages. Plaintiffs are Negroes, members of the Local Union and employees of Sheffield. The class suit is for all negro member employees.

Plaintiffs complain of the Agreement of May 31, 1956, amending the Seniority Provisions covering employees of Sheffield Steel, claiming that such Agreement discriminates against negro member employees.

The evidence shows that Sheffield employs both white and negro employees and that the membership of the Local Union is composed of both white and negro members. An estimate of the membership of the Local Union is 1700 white members and 1300 negro members. The percentage of negro membership is considerably in excess of the percentage of negro population in the area. All members have equal voting rights. The evidence shows that the Local Union has elected negro officers in 1956 and in prior years. The Local Union is the bagaining agent. The Agreement of May 31, 1956, was adopted by the membership of the Local Union by a vote of 1417 to 202.

[*Separate Lines of Progression*]

The Agreement provides for separate lines of progression, classified as No. 1 Line of Progression and No. 2 Line of Progression, the No. 1 Line encompassing jobs classified as skilled labor. The No. 1 Line affords greater opportunity for advancement. Point 6 of the Agreement provides:

"6. The Company will give tests as follows:

"A. Any present employee not now in a No. 1 Line of Progression will be eligible to take the tests, if he so desires. All such employees shall notify the Company in writing of their desire to take the tests within twenty (20) days after date of acceptance of this Agreement and such employees will be given the tests within forty (40) days thereafter.

"B. Any employee hired hereafter will be required to take the tests.

"C. An employee who elects not to take the tests during the twenty (20) day period may request and take the tests after the lapse of six months. An employee who fails to pass the tests may retake the tests after the lapse of six months.

"D. The content of all tests and the minimum passing grades will be determined solely by the Company. Upon request the results of an employee's tests will be open for inspection by the employee with or without the President or Chairman of the Plant Grievance Committee present, as he may elect."

Those desiring to transfer from a No. 2 Line to a No. 1 Line must not only satisfy the tests but, when qualified, must start at the bottom of the No. 1 Line grades, sometimes at a financial sacrifice.

[*Available to Both Races*]

Tests for No. 1 Line of Progression are available to white and Negro alike. From the evidence, 317 Negroes have taken the tests, 90 Negroes have made qualifying grades and 45 Negroes have actually moved into No. 1 Line positions. None of the nominal plaintiffs or their witnesses, all Negroes, has taken the tests. Each admitted that the tests were available to him.

Plaintiffs offered no evidence of damages.

The rules apply to Negro and white alike. Evidence of discrimination is not convincing.

The following are filed as Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

a. The Parties

1. The five individual plaintiffs are negro citizens of the United States and of the State of Texas. They purport to sue on behalf of themselves and other persons similarly situated, that is, on behalf of all negro citizens who are employees of the defendant Sheffield.

Plaintiffs are members of the defendant Local Union 2708, which is affiliated with the United Steelworkers of America AFL-CIO. Likewise, the negro citizens whom plaintiffs allege they represent are members of said Local Union No. 2708.

2. The defendant Armco Steel Corporation is an Ohio corporation. It commenced the operation of the steel mill at Houston, Texas, on July 1, 1954. In its Houston operations it is now known as Sheffield Division Armco Steel Corporation. The original operator of the steel mill in question was the Sheffield Steel Corporation of Texas, a Texas corporation which was incorporated in the year 1941, and was dissolved on July 1, 1943. On July 1, 1943, the plant commenced operations by the American Rolling Mill Company, an Ohio corporation. Such operations continued until January 1, 1946, when the operation of the plant was taken over by Sheffield Steel Corporation, an Ohio corporation. On July 1, 1954, Sheffield Steel Corporation was dissolved and the operation was taken over by the defendant Armco Steel Corporation. The corporate defendants will, for convenience, be referred to simply as "Sheffield" or the "Company".

[*Exclusive Agent*]

3. Defendant Local No. 2708 of the United Steelworkers of America AFL-CIO is the exclusive bargaining agent of all production and maintenance employees at the Houston Plant of the defendant Armco Steel Corporation, except those who are excluded from the bargaining unit by the collective bargaining agreement of November 29, 1956.

In the year 1942 in Case No. 16-R-488, United Steel Workers of America CIO was certified by the National Labor Relations Board as the exclusive collective bargaining agent for employees at the Sheffield Steel Corporation of Texas. There was a further certification of the same Union in the year 1945 in Case No. 16-R-1233 for 25 additional employees. Local 2708 is a subordinate organization o the United Steelworkers of America.

Although there has been no further formal certification of the Union, Local 2708 has been, throughout the years, recognized by the various corporate employers as the exclusive bargaining agent for the employees in question. At all times in this litigation Local 2708 has admitted for itself that it is under a duty to discharge its duties in conformity with the Constitution, laws and public policy of the United States, and has rested its defenses upon the ground that it has done so in all respects.

Defendant, United Steelworkers of America, Local 2708, will, for convenience, sometimes be referred to as the "Union".

b. Jurisdiction

4. The jurisdiction of the court arises under Title 28, United States Code, Section 1331, being brought as a suit under the Constitution and laws of the United States, to-wit: the Fifth Amendment to the Constitution and Title 29, United States Code, Section 159, more commonly known as The National Labor Relations Act, as amended, with requisite jurisdictional amount in controversy.

c. History of Local 2708

5. There are approximately 3,000 employees in the production and maintenance unit who are represented by Local 2708. Of this number approximately 1,700 are white employees and 1,300 are negro employees. Under the laws of the State of Texas, a Union shop may not be

authorized by The National Labor Relations Act and has never been in effect at the Houston Plant, and all Union membership has been voluntary. However, practically 100 per cent of all employees are members of Local 2708.

6. At all times, defendant Local 2708 has been a completely integrated local. Full membership has been available regardless of race and without qualification. The negro employees have taken full advantage of these membership rights throughout the years by full and active participation in the affairs of the Union, and in bargaining with their employer and in the execution of all contracts and agreements. The collective bargaining contracts have been negotiated and signed by negotiating committees which at all times included members of the negro race. The various lines of progression which are involved in this suit have been negotiated in past years with the full and active participation of negro employees acting in their capacity as Union officers and have often been formally executed by them.

In the exercise of their rights of franchise within the Union, the employees have frequently elected negro members to Union offices, and in particular, the office of Plant Grievance Chairman, a key position in the negotiation and administration of the labor contract has been held by a Union member of the negro race consecutively from 1948 until the date of trial, with the exception of one two-year term.

[*Negroes Participate*]

The record abundantly establishes that at all times in the past the negro employees have actively and effectively participated in all features of the collective bargaining process, and that the existing collective bargaining contracts and lines of progression were established and maintained by their active participation, procurement and consent, except insofar as the named plaintiffs now object to certain features of the Agreement of May 31, 1956.

d. The Alleged Cause of Action

7. It was stipulated by the parties at the trial, and it has been made explicit by the parties in their briefs, that this suit for injunction, declaratory judgment and damages has been brought to establish the invalidity of a certain agreement dated May 31, 1956.

Specifically, plaintiffs have claimed in their brief before the court that the Agreement of May 31, 1956, is discriminatory and invalid for two reasons: (1) It subjects negro employees in the plant to qualifying tests as a condition for promotion to certain jobs in the plant; and (2) It subjects many negro employees to suffer a reduction in wages and a loss of seniority previously accrued in a department as a condition of promotion. These conditions Plaintiffs claim are applicable to negro employees if they desire to promote from the Company's No. 2 Lines of Progression into the No. 1 Lines of Progression.

For the reasons hereinafter set out, the court finds and concludes that plaintiffs' claims are factually unsound. The provisions which are claimed to be discriminatory actually apply equally to all employees and are based in every case upon relevant and compelling reasons of efficiency of operation.

e. Background Prior to May 31st Agreement

8. Over the years, the collective bargaining agreements with the Union covering the employees in the bargaining unit in question have been master contracts, that is they have covered the operations of the employer in many plants throughout the United States.

Such agreements, which are common to the steel industry, have provided that at each local plant seniority units would be established within a department or within any subdivision thereof.

Pursuant to such contractual agreement, the Houston Plant established two or more lines of progression within each department, each line constituting a seniority unit.

9. The Sheffield Plant at Houston, Texas, commenced operations in about April, 1942. On February 23, 1943, the Union was recognized as the collective bargaining agent for all production and maintenance employees of Sheffield at the Houston Plant, with immaterial exceptions, and the first collective bargaining contract between the Company and the Union was executed on that date.

10. Prior to the execution of the first collective bargaining agreement on February 23, 1943, the Company had the uncontrolled right of selectivity in its employment of persons and in the designation of the jobs and the duties which such employees would perform. During the period prior to February 23, 1943, the Company

employed white persons to perform the skilled jobs and employed Negroes to perform common labor and unskilled jobs. In doing so, the Company followed the prevailing custom in this area and during such period the only available supply of skilled workers was from the white group.

[*USES Services Used*]

11. During the period commencing about January 1, 1942, and ending in November, 1946, by reason of Federal law and regulation governing the use of manpower, the Company could only hire employees furnished to it by the United States Employment Service and approved and cleared through that agency. During such period USES furnished the Company white skilled employees and negro common labor and unskilled employees.

12. When United States Employment Service was discontinued in November, 1946, the Texas Employment Agency, a branch of the Texas State Government, began furnishing Sheffield with persons seeking employment and continued the practice of furnishing white applicants for skilled employment and negro applicants for common labor and unskilled work.

13. Continuously during the period from February, 1943, to date, negro employees in responsible positions and offices in the Union have participated in the negotiation of the bargaining contracts, progression charts, grievances and similar proceedings and have joined in the execution of the contracts and writings entered into between the Company and the Union.

[*Negroes Approve*]

14. Prior to November, 1954, the Negroes affirmatively approved and agreed to the promotion and progression practices and other practices in effect in connection with the filling of the jobs in the bargaining unit at the Sheffield Plant. During all of this period, the Negroes signified complete agreement to all such practices and did not object, protest or evidence any dissatisfaction.

15. Each line of progression has constituted a series of logically interrelated jobs. The bottom job of each required the least skill, experience and potential ability. Each job successively requires increased skill, experience and ability. Such lines of progression have been negotiated and agreed to in writing between the Company and the Union at various times in the history of the plant.

Throughout the years, the skilled jobs within a department have been logically grouped together in one or more lines of progression. On the other hand, the unskilled jobs and those requiring minimum skills have been logically arranged within one or more separate lines of progression. The skilled lines of progression have been uniformly denominated as No. 1 Lines of Progression, and the unskilled as the No. 2 Lines of Progression.

In the staffing history of the plant, above related, the No. 1 Lines were occupied by white employees and the No. 2 Lines by negro employees.

In formalizing these Lines of Progression into signed agreements over the years, the negro employees, as above stated, participated in their designing and formal execution.

16. For the first time, in November 1954, negro employees at the Sheffield Plant expressed dissatisfaction with respect to the failure to permit them to transfer from the No. 2 Lines of Progression into the No. 1 Lines of Progression.

[*Negotiation Commenced*]

17. Promptly after the communication to the Company of this first expression of dissatisfaction, negotiations were commenced between the Company and the Union for the purpose of considering the grounds of dissatisfaction expressed by the Negroes as well as changes desired by them, including particularly a proper basis for permitting Negroes to enter No. 1 Lines of Progression.

18. These negotiations were conducted between Company representatives and a Joint Union Seniority Committee composed of two negro representatives and two white representatives, together with proper Union officials. These negotiations culminated in the formulation of the May 31st Agreement and such negotiations were conducted openly, fairly and in good faith by all parties. These negotiations lasted for a period of about one year during which time all representatives were free to and did express their views and ideas.

19. The negro representatives on the Joint Union Seniority Committee objected to some of

the provisions of the proposal of the Company which later constituted the May 31st Agreement and submitted their counter-proposal of May 10th which sets forth the agreement desired by them. Because of this difference of opinion, these negro representatives opposed the ratification of the May 31st Agreement by the Union membership.

20. The May 31st Agreement was submitted to the vote of the Union membership with the result that in the Union ratification meetings of May 24th and May 25th, 1,412 Union members voted in favor of the agreement and 202 voted against it. On those dates there were between 1,250 and 1,300 Negroes who were members of the Union and eligible to vote at these ratification meetings, but the vast majority of them elected not to vote either to approve or disapprove the May 31st Agreement.

f. Lines of Progression

21. As stated above, operations at the Sheffield Plant are divided into departments which in turn are subdivided into Lines of Progression. Each Line of Progression covers a definite and particular branch or phase of the operations, and consists of logically interrelated series of jobs beginning with a bottom job, which requires the least skill, training and experience and ascends in a logical step-by-step progression to the top job, which requires the greatest skill, training and experience in the particular phase of operations covered by that line of progression.

22. In negotiating Lines of Progression, the Company has insisted upon and obtained an arrangement of jobs which are logically interrelated with each other in the mechanical operations of the plant. The Company has not and would not agree to any other type of Line of Progression except one so based upon the interrelation of the jobs.

23. A job vacancy or opening in a Line of Progression is filled by promoting, on the basis of seniority within that line, the man who occupies the job immediately below the vacancy with the result that a vacancy in a job high in the line operates to advance each man lower in the line one step upward. This progression or promotion system leaves the ultimate vacancy at the bottom of the line.

24. Efficient and prudent operations require the progression and promotional system which is carried out in the Lines of Progression. The training, experience and skill which a man obtains in the bottom job of a Line is a prudent and good faith prerequisite to his advancing to the next higher job in the Line.

[*Good Faith Prerequisite*]

25. Similarly, the training, experience and skill which a man obtains in every other job or step in a Line is a prudent and good faith prerequisite to his advancement to the next higher job in the Line. The requirement that a man fill each such job in order to qualify him for the next higher job is motivated by good faith and sound judgment and is not motivated by bad faith or discrimination of any sort.

26. The requirement that a man shall promote in a Line of Progression on the basis of his seniority within that Line is a good faith and prudent business requirement and is not motivated by bad faith or discrimination. Otherwise, if a man is promoted in a particular Line on the basis of seniority acquired elsewhere, promotion would be on the basis of factors and experience unrelated and irrelevant to the work and skills required for the particular promotion. Without this requirement there is no assurance that when a man enters a Line, he will work in each job in the series that constitute such Line and thereby acquire the skill, training and experience essential for promotions and essential for sound business operations. If a man were permitted to use an extraneous seniority to promote within a Line of Progression, he might well skip rapidly into the high job in the Line and override employees whose occupancy in the Line and whose necessary accumulated skill, training and experience in these related jobs is vastly greater.

Moreover, this would deprive the Company of the safeguard which is properly a condition to the Company agreement to any system of promotions based on seniority and that is, the requirement of a step-by-step accumulation of skill, training and experience as a prerequisite to promotion.

[*Present Good Faith*]

27. All of the aspects of Lines of Progression as they are now in operation at the Sheffield

Plant—including the make-up of these Lines, the jobs contained therein, the interrelationship of of such jobs, promotions into and within such Lines, the requirement that an employee entering a Line begin at the bottom or starting job, the requirement that promotions be based upon seniority within a Line—are actuated by good faith and prudent business management and are not motivated or tainted by bad faith or racial discrimination. To eliminate any of these aspects would decrease efficiency and would result in great harm and disadvantages to both the Company and its employees, white and negro.

28. Prior to the May 31st Agreement, Sheffield had the prerogative to hire any employee it desired to fill the bottom or starting jobs in the No. 1 Lines whenever a vacancy occurred. It filled each such bottom job with employees that it determined had (1) the ability to perform the particular bottom job opening, and (2) had the potential to advance up the line and fill all jobs to and including the highest job in the line. The Company filled the bottom job by interviewing applicants, investigating such applicants with prior employers and references furnished by applicants, appraising and screening such applicants which process was conducted by the Company's employment supervisor and by the superintendent of the department in which the job opening existed. Finally, the applicant who was employed in the bottom job of any No. 1 Line had to undergo an initial 260-hour probationary period during which time the Company could observe and carefully study and review the man's work, ability and potential for advancement. If for any reason the Company was not entirely satisfied with the employee hired to take a bottom job in a No. 1 Line during this 260-hour probationary period, the Company had the uncontrolled right to discharge such man and neither the man nor the Union could question the Company's decision, file any grievance or resort to any arbitration based thereon.

[*Starting Job*]

29. Accordingly, prior to the May 31, 1956, Agreement in the No. 1 Lines of Progression, the bottom job has always been a starting job. That is, in the filling of such bottom job, the Company hired new employees, whom it selected in its sole discretion, subject to its own standards. At no time has any employee had any right to bid on such a starting job upon the basis of his seniority or otherwise. At no time has the Union had the right by means of closed shop, union shop or any hiring practice to specify or recommend what person should fill such a job, or what his qualifications should be.

30. The only exception to the foregoing practice of hiring new employees has been the infrequent occasions when the Company allowed an employee to "transfer" from one department to another. In such a case, however, the Company still had unlimited discretion to permit or not permit such a transfer from one department to another. In such a case the transferred employee took no seniority with him. This has always applied to the transfer of a white employee from one Line of Progression to another.

31. In agreeing and contracting to promote within a Line of Progression, the Company has agreed to promote by seniority within that Line of Progression. The agreement of the Company, however, has been based upon its free and unfettered right to establish qualifications and make original selection in the first instance. In its hiring practices the Company has not hired an employee solely for his ability to perform the bottom job, but to the contrary, the selection has been based upon the potential ability of the employee to promote successfully to the highest job, thereby providing the Company with a pool of competent manpower adequate to its operational needs. Furthermore, the reason for promotion by seniority within a Line of Progression has been to insure the full development of each employee in each successive job in the Line of Progression, thereby assuring to the Company that the employee will develop maximum experience and know-how within the particular phase of operation before moving upward to the next job. Accordingly, the Company has not and would not agree to promotions based upon seniority in some other Line of Progression, since to do so would promote employees without reference to their experience, development and know-how within a particular phase of the operation. The record establishes that the employer's operation is an integrated steel mill of many different departments and Lines of Progression, as a result of which experience on some Line of Progression or department has little or no relation to the experience needed within a particular Line of Progression.

[*Bidding Restricted*]

32. Accordingly, no employee of any race has been allowed to bid into any Line of Progression at any point above the bottom job, and no employee of any race has been allowed to be promoted out of line of his seniority in that particular Line of Progression.

33. Before 1949 exactly the same rules applied as above stated, and these rules applied to both the No. 2 Lines of Progression and the No. 1 Lines of Progression. In 1949, however, the Union, acting principally through the then Chairman of the Grievance Committee, a member of the Negro race, persuaded the Company to agree to tie in all of the No. 2 Lines of Progression at the bottom with the so-called "labor department or labor pool". Under this 1949 arrangement negro employees were hired into the labor department and then bid into the bottom jobs of the No. 2 Lines of Progression by seniority. Conversely, if there were a layoff in any No. 2 Line of Progression, the employees instead of losing their jobs altogether were admitted back into the labor department, thereby retaining a job if they had plantwide seniority over some other employee in the labor department. The 1949 arrangement offered certain advantages to the then occupants of the No. 2 Lines of Progression, who were Negroes, because it gave them a cushion of jobs to fall back on in case of layoffs. By contrast, the then occupants of the No. 1 Lines of Progression had no tie-in at the bottom with any other department or pool. Consequently if a lay-off occurred in any No. 1 Line of Progression, it was possible and frequently happened that an employee was laid off and had no job at all, while in some other department an employee junior to him on a plant-wide basis was still at work.

34. The then occupants of the No. 1 Lines of Progression on being laid off were sometimes listed on the so-called "Extra Board", which was nothing more than a list of names from which an employee could be assigned a day's work here and there, if any work was available.

35. The May 31, 1956, Agreement abolished the "Extra Board". It provides that all employees of any race shall be hired into the labor pool. There is only one starting job, and there is no distinction in wage or required qualifications on account of race.

g. The May 31st Agreement

36. The May 31st Agreement provides that if the bottom job in any No. 1 Line becomes vacant, the Company must fill this vacancy first by subjecting the job to the bid of a man in the No. 2 Line of Progression in the same department, if there be any such man who has passed the qualifying test. If there be no man in a No. 2 Line in the same department who has passed the qualifying test, the Company is compelled to fill the opening job in a No. 1 Line with a man in the Labor Department who has passed the test. Under the May 31st Agreement, the first preferential right to demand and receive any open starting job in a No. 1 Line of Progression rests with the qualified employees who are then in a No. 2 Line of Progression in the same department and the second such preferential right rests with the qualified men in the Labor Department. If any man with such preferential right demands the job, the Company cannot deprive him of it. Such man having passed the qualifying test is not subject to any further investigation, screening or appraisal for the purpose of determining his potential to advance in the No. 1 Line of Progression although, of course, he must have the physical fitness and ability to perform the job opened. Further, such man is not required to undergo any probationary period during which the Company has any right to either discharge the man or to demote him.

37. Upon the effective date of the May 31st Agreement, all jobs in No. 2 Lines of Progression and in the Labor Department of the Sheffield Plant were filled by Negroes. The May 31st Agreement operates to vest in such negro employees who pass the test the preferential right to fill future openings in No. 1 Lines of Progression.

[*Progression Appropriate*]

38. The Lines of Progression have been set up in good faith, in accordance with sound and prudent business management, and are appropriate for the efficient operation of a steel mill. They were not motivated by bad faith or racial discrimination. It is true that prior to the May 31st Agreement only white employees staffed the No. 1 Lines and negro employees staffed the No. 2 Lines. The No. 1 Lines involved the performance of skilled work in the production and

maintenance departments of the Company and the No. 2 Lines involved the performance either of unskilled work or work requiring a minimum degree of skill. Since the May 31st Agreement there is no racial distinction or discrimination in the No. 2 and No. 1 Lines but all such Lines are now being staffed indiscriminately with both white and negro employees. The fact that prior to the May 31st Agreement No. 2 Lines were staffed by Negroes does not present any basis for eliminating No. 2 Lines since the true basis for the existence of the No. 2 Lines is to provide a proper, prudent and sound sub-departmentalization of the operations of the steel plant regardless of whether the employees in such Line consist wholly of Negroes, wholly of whites or both races indiscriminately.

39. The May 31st Agreement, in providing preferential rights for employees in the No. 2 Lines and in the Labor Department to fill starting job openings in No. 1 Lines, requires that the employee first pass a test. This test requirement supersedes and wholly supplants the right, prior to the May 31st Agreement, of the Company to pick and choose, interview, screen, appraise and subject to a 260-hour probationary period the employee who fills the starting job.

[*Selectivity Sought*]

40. During the negotiations for the May 31st Agreement, the Company originally requested that it retain its right of selectivity by having the right of selection from among the employees in the plant to fill the bottom jobs in the No. 1 Lines of Progression. This position and request were strenuously objected to by the Union, including particularly the negro members of the negotiating committee, on the ground that the right of selection under such circumstances would give the Company an opportunity to practice favoritism. Such position was maintained not only during the negotiations but at the trial.

41. The Company eventually surrendered its original right of selection, accepting in lieu thereof the uniform qualifying test. Under such substitute arrangement, the Company was compelled to fill the bottom job by seniority, provided the uniform qualification test was passed.

42. During the negotiations for the May 31st, 1956, Agreement, the Union bargained for and obtained substantial concessions from the Company concerning the uniformity and fairness of the Company test, and provided adequate machinery to check the examination results, thereby assuring all employees equal and fair treatment.

[*Tests Standard*]

43. The examinations accepted by the Company and administered to the employees are tests in wide commercial usage, and are scientifically designed to reveal the potentiality of the employee to promote to the highest skilled jobs in the plant. The examinations are a fair and reasonable substitution of the Company's right to an original selection. No question was raised at the trial in regard to the fairness with which the tests were administered. The record reveals that approximately 90 negro employees have passed the examinations and approximately 45 have moved into the bottom jobs of a No. 1 Line of Progression. The other 45 constitute a reservoir of qualified employees to move into the No. 1 Line of Progression as and when the bottom jobs open. This number has qualified themselves in spite of the fact that most of the negro employees in the plant have declined the invitation to take the examination. Several negro witnesses at the trial testified that they declined to take the examination as a matter of principle or for personal reasons, and there is substantial evidence in the record from which the court concludes that there has been voluntary refusal to take the examination on the part of most of the negro employees, apparently in reliance upon this litigation as a means by which such requirement will be dispensed with.

[*No Bad Faith*]

44. The requirement of the test in order to qualify for employment in the No. 1 Lines is a good faith, prudent business requirement and is not motivated by bad faith or discrimination in any form.

45. Operating efficiency demands that an employee who enters a No. 1 Line have not only the ability to perform the bottom job in the Line but the potential to advance in the Line and to fill the highest job therein. If employees enter No. 1 Lines and do not have the ability to progress in such Lines, the operations will be seriously handicapped because of unavailability of employees to take the top skilled jobs.

46. The test requirement is the minimum assurance with which the Company can operate with efficiency.

47. The negro representatives on the Joint Seniority Committee which conducted negotiations leading to the formulation of this agreement did not object to or oppose the inclusion in such agreement of the test requirement. There is no ground or basis upon which to condemn the test requirement and to do so would require a finding of bad faith not only on the part of the Company and the Union, but also the negro representatives who were specifically carrying out the representation of the negro employees and there are no facts upon which to predicate bad faith on the part of any of these parties.

[*All Take Same Test*]

48. All white employees must take the same test in order to enter the bottom job of any No. 1 Line of Progression and this is so whether they are new employees or old employees. The examination is uniform and fair and applies to all.

49. Plaintiffs' objection that there is discrimination in the failure of the May 31st Agreement to require incumbents in a No. 1 Line to pass the test as a prerequisite to promotion in their own Lines has not been supported by the evidence.

50. The No. 1 Line incumbents have been screened, tested, appraised and subjected to a 260-hour probationary period which is a good faith and prudent assurance of their potential to advance in such Lines.

51. The negro representatives on the Joint Union Seniority Committee objected to the Company's continuance of its practices with respect to such selection, screening and probation in filling starting No. 1 Line jobs and agreed to the present qualifying tests as being less onerous to the employees.

52. The adoption by the Company of the testing procedures as a more modern and accurate gauge of an employee's potentiality was under consideration by it before the issues in the present case arose. The Company, in the exercise of its discretion in hiring unilaterally, installed the tests for new employees before the negotiation of the May 31st Agreement.

53. The claim that negro employees who qualify are discriminated against because they are compelled to bid in at the bottom job of a No. 1 Line of Progression is without foundation in fact. This will occur in a relatively few instances only, and applies equally to the members of both races.

54. Furthermore, if any employee could be said to be dissuaded by his drop in pay, the job then falls to the bid of another negro employee. Therefore, the court finds that it is not true that the purpose of the arrangement is to discourage employees on account of their race, especially in view of the excellent history of both the Union and the Company in the matter of protection of negro employees' rights.

CONCLUSIONS OF LAW

I conclude:

1. The May 31st Agreement and the Lines of Progression now in effect at the Sheffield Plant do not violate any Constitutional or Statutory provision, constitute the good faith exercise of the functions, powers and authorities of Sheffield and of the Union, are not in any way motivated by or tainted with any bad faith or racial discrimination, and are in all respects lawful.

2. Every feature of the May 31st Agreement has its foundation on essentially "relevant" factors as defined by the Supreme Court of the United States [1] and the United States Court of Appeals for the Fifth Circuit.[2]

3. Defendants are not guilty of any wrongful or actionable conduct toward plaintiffs.

4. Plaintiffs are not entitled to any of the relief sought by their Complaint.

True copies hereof will be forwarded by the clerk to counsel of record, who will draft and submit judgment accordingly.

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1. Steele v. Louisville & Nashville R.R. Co. (1944), 323 U.S. 192, 89 L.Ed. 173. Ford Motor Co. v. Huffman, et al. (1953), 345 U.S. 330, 97 L.Ed. 1048. Syres, et al. v. Oil Workers International Union, et al. (1955), 350 U.S. 892.
2. Pellicer, et al. v. Brotherhood of Railway & Steamship Clerks, et al. (1954), 217 Fed.(2d) 205.

TRIAL PROCEDURE
Grand Juries—Federal Statutes

Arthur BARY et al. v. UNITED STATES

United States Court of Appeals, Tenth Circuit, August 23, 1957, 248 F.2d 201.

SUMMARY: Seven persons were indicted by a federal grand jury in Colorado for conspiracy to violate the Smith Act. A motion was filed to dismiss the indictment on the ground, among others, that there had been a systematic exclusion from the grand jury panel of Negroes, persons of Spanish-American or Mexican descent and other minority groups. A similar motion to quash the panel from which the petit jury would be drawn was filed. A hearing was held by the trial court on the motions and the defendants were offered an opportunity to examine records of the clerk concerning the selection of jurors. The trial court found that there had been no systematic exclusion or token inclusion of members of minority groups. The defendants were convicted. On appeal the Court of Appeals for the Tenth Circuit sustained the finding of the trial court on the question of the jury panels but reversed the conviction on other grounds. A part of the court's opinion, by Chief Judge BRATTON, is set out below:

* * *

A motion was filed in the case to dismiss the indictment. One ground of the motion was that the array of the grand jury was defective in that it was not selected, drawn or summoned in accordance with law; that there had been a systematic exclusion therefrom by the clerk and the jury commissioner of Negroes, persons of Spanish-American or Mexican descent, and other minority groups; that there had been a systematic exclusion of manual workers and wage earners; that the representation of Negroes, persons of Spanish-American or Mexican descent, other minority groups, manual workers, and wage earners, had been limited to token representation; that the array had been weighted in favor of and dominated by representatives of the owner-manager groups of the community; and that the clerk had failed to carry out the statutory and constitutional mandate to employ methods and procedures which would insure representation of a cross section of the community. And based upon similar grounds, a motion was lodged to quash the panel from which the petit jury would be drawn to try the case. While officials charged with the responsibility of selecting names of persons for service on grand and petit juries may exercise some discretion to the end that competent persons be selected, it is the long and unbroken tradition that methods and procedures must be employed which contemplate grand and petit juries from and truly representative of the cross-section of the community. It is not essential however that every grand jury or petit jury include representatives of all racial, economic, or social groups of the community. Neither is exact proportional representation of ethnic, economic, or social groups a prerequisite to validity. Akins v. Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692; Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839. But an indictment returned by a grand jury or a verdict of guilty returned by a petit jury in a criminal case cannot stand if representatives of such groups were systematically and arbitrarily excluded from the list of persons from which such grand jury or petit jury was chosen. Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.

[*Hearing Held*]

With these general principles serving as directing guides, the court conducted a hearing upon the challenge to the array of the grand jury and the panel of the petit jury. The clerk, three of his deputies, and the jury commissioner testified. A complete explanation was given of the methods and procedures employed in making up the lists from which arrays or panels of grand and petit juries were selected. And the crux of the testimony was that there had not been any systematic exclusion or token representation of Negroes, persons of Spanish-American descent, manual workers, wage earners, or members of lower economic groups. In connection with the chal-

lenge, appellants filed a motion for permission to examine the questionnaires sent out during the last ten years, and to examine other records in the office of the clerk. The court entered an order permitting appellants to examine the grand and petit jury panels for the last four years; permitting appellants to examine all of the questionnaires returned within the last four years but providing that the examination of the questionnaires should be made in the presence of an employee of the clerk and that such employee should keep the name and address on each questionnaire confidential; and permitting appellants to examine all letters, records, books, and other papers which may have been used by the clerk in selecting names for the arrays or panels during the last four years. Dissatisfied with the examination of the questionnaires in the manner specified in the order, appellants later filed a motion for permission to examine them completely. The thrust of the motion was for permission to examine the questionnaires particularly in respect to names and addresses of the persons who signed and delivered or forwarded them to the clerk. The motion was denied. And based in part upon the testimony adduced at the hearing, in part upon the records of the court, and in part upon its knowledge of conditions in Colorado, the court found that there had not been any systematic exclusion or token representation of the groups referred to in the challenge. The court was not required by statute, rule, or otherwise, to make the names and addresses on the questionnaires available to appellants for examination and scrutiny. Whether they should be made available for such purpose was a matter resting in the sound discretion of the court. And there being no showing of total exclusion from the lists of persons within the groups referred to in the challenge to the array or panel of grand and petit juries, there being evidence that there had not been any systematic or token representation of persons within such groups, and the court having expressly found with supporting foundation that there had been no systematic exclusion or token representation of that kind, it cannot be said that the denial of the motion for permission to examine the questionnaires in respect to addresses and signatures of the persons who returned them to the clerk constituted prejudicial error.

• • •

TRIAL PROCEDURE
Juries—Kansas

STATE of Kansas v. Julio LOPEZ

Supreme Court of Kansas, December 7, 1957, 318 P.2d 662.

SUMMARY: Lopez, a person of Mexican extraction, was indicted, tried and convicted in a Kansas state court for larceny. He appealed the conviction to the Kansas Supreme Court on grounds, among others, that the overruling by the trial court of a motion to quash the information and the jury panel was erroneous. The motions were made on the basis that members of the "Mexican race" had been systematically excluded from jury service in the county in which he was being tried in violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment. The court found that there was no showing that any person of Mexican or Spanish descent was qualified for jury service in the county and no showing that there had been any racial discrimination in the selection of the juries. Part of the court's opinion, by Justice FATZER, follows:

Appellant, Julio Lopez, was jointly charged with Eddie Alfaro and Albert Mureno with the larceny of various items of merchandise exceeding $20 in value from the J. C. Penney Clothing Store in Junction City, Kansas, on January 31, 1956. Appellant was tried by a jury in the district court of Geary County and convicted of the offense charged. Following the overruling of his motion for a new trial appellant has appealed.

• • •

Before impanelling the jury a hearing was had before the trial court on appellants motions to quash the information and the jury panel on the grounds that members of the Mexican race were systematically excluded from jury service in Geary County resulting in his being denied equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, and cites and relies upon Hernandez v. State of Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866. In support of the motions, the appellant called the county clerk as a witness and inquired whether he knew of any Mexicans or members of the Mexican race being chosen for jury service. The county clerk answered that he was not a good enough judge to tell by a prospective juror's name what his nationality was; that he did not know whether there were members of the Mexican race residing in any of the towns, cities or townships in Geary County; that following the drawing of the names of prospective jurors the sheriff received a copy of the names drawn; and, that he kept a copy in his office but he had no use or interest in it and had nothing further to do with the selection of jurors.

In his brief appellant quoted from the 1950 Census Report of the United States Department of Commerce of Geary County which showed a total population of 21,671, and listed "other races," males, 60; females, 32. Appellant states in his brief "that there has never been a Mexican or a person of Spanish descent on a petit jury in Geary County, Kansas, for at least a period of forty years." No evidence was introduced to support the statement, however, the trial judge stated he had been a resident of Junction City for nearly forty years and that during that time some Mexicans lived in Junction City but none of them to his knowledge had ever attained the qualifications of a juror, and that at the present time he did not know of any Mexicans residing in Junction City or Geary County.

Assuming, *arguendo,* that appellant's statement was correct: that no Mexicans served on a petit jury in the last forty years, he would be required to accept the fact, under this record, that none attained the qualifications of a juror and that none resided in Geary County at the time the jury which tried him was chosen. Information from the 1950 Census Report does not show of what the "other races" consisted, and the population of that category is insufficient in a county of 21,671 population to create a presumption that members of that race were systematically excluded from jury service. If Geary County had a large Mexican population, which it does not, and if it had actually been shown that members of that race had not served on a petit jury over a period of many years, it might properly be contended there was a systematic exclusion of members of that race from jury service. However, the evidence was that jurors were selected in accordance with the laws of Kansas; that members of the Negro race have never been excluded from jury service in Geary County; that Negroes were on the panel which tried appellant; and, that the Mexican population, if any, in Geary County was not large enough to raise a presumption of systematic exclusion from jury service. There was no showing that there was any race discrimination in the selection of the regular jury panel from which the jury which tried appellant was chosen (State v. Palmer, 173 Kan. 560, 570, 251 P.2d 225).

* * *

We have fully reviewed the record and have concluded there was sufficient evidence on which to submit the case to the jury and to support the verdict of guilty. No prejudicial error has been affirmatively made to appear that the appellant did not receive a fair trial. The judgment is affirmed.

TRIAL PROCEDURE
Juries—Mississippi

UNITED STATES ex rel. Robert Lee GOLDSBY v. William HARPOLE, Superintendent of the Mississippi State Penitentiary.

United States Court of Appeals, Fifth Circuit, November 20, 1957, 249 F.2d 417.

SUMMARY: Goldsby, a Negro, was convicted of murder in a trial court in Mississippi. His conviction was affirmed by the Mississippi Supreme Court. 78 So.2d 762 (1955). Thereafter he petitioned the United States Supreme Court for a writ of certiorari, alleging for the first

time a denial of the equal protection of the laws in that Negroes had been systematically excluded from jury service in the county in which he was tried. The United States Supreme Court denied the petition. 350 U.S. 925 (1955). Goldsby then petitioned the Mississippi Supreme Court for leave to file a writ of error coram nobis on the grounds of newly discovered evidence and the denial of his federal constitutional rights through the exclusion of Negroes from jury service. The Court held, as to the denial of constitutional rights, that this issue was raised too late and further that there was no evidence of such a systematic exclusion of Negroes from jury service. 86 So.2d 27, 1 Race Rel. L. Rep. 565 (1956); certiorari denied, 352 U.S. 944 (1957). Goldsby then petitioned in a federal court for a writ of habeas corpus on grounds that his conviction was in violation of the Due Process Clause of the Fourteenth Amendment because of the systematic exclusion of Negroes from the jury lists. The district court dismissed the petition, apparently on the basis that the constitutional question had not been raised in the state courts at the trial. On appeal the Court of Appeals, Fifth Circuit, reversed, holding that Goldsby was entitled to a hearing on his petition because of his allegations that he was precluded, by ignorance and the speed of the trial, from raising the issue in the state court.

Before RIVES, JONES and BROWN, Circuit Judges.

Brown, Circuit Judge.

In his application for writ of habeas corpus to the court below, appellant Goldsby alleged that his conviction for murder and sentence of death imposed by the courts of Mississippi, Goldsby v. State, 78 So.2d 762; cert. denied, 350 U.S. 925, 100 L.Ed. 809; Goldsby v. State, 86 So.2d 27; cert. denied, ... U.S. ....., 1 L.Ed.2d 239, constitute a deprivation of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution because of the systematic exclusion of members of his, the Negro race, from the lists from which grand and petit juries are selected in Carroll County, Mississippi and therefore from the grand jury which indicted him and the petit jury before which he was tried.[1]

The District Court dismissed the application without requiring any response from the State of Mississippi, apparently on the thesis that it failed to state any basis for the requested relief since it was asserted that the record of the criminal proceedings at no time during the trial of appellant for murder showed that the constitutional question was raised. We feel that the petition was too summarily dismissed and that the appellant is entitled to a hearing upon his allegations, Chessman v. Teets, 350 U.S. 3, 100 L.Ed. 4.

[*Habeas Corpus Available*]

That Federal habeas corpus is available to prisoners in custody under the final judgments of the courts of the several states to test the constitutionality of their deprivation of liberty has long been established by statute, 28 USCA 2241, and is not open to question. It is equally well settled that the systematic exclusion of members of the race of an accused from the juries by which he is indicted and tried is a denial of the constitutional guarantees which must be afforded to one accused of crime and brought to trial in a state court. Patton v. State, 332 U.S. 463, 92 L.Ed. 164; Hill v. Texas, 316 U.S. 400, 86 L.Ed. 1559; Smith v. Texas, 311 U.S. 128, 85 L.Ed. 84; Norris v. Alabama, 294 U.S. 587, 79 L.Ed. 1074; Bush v. Kentucky, 107 U.S. 110, 27 L.Ed. 354.

Having alleged a prima facie case of a denial of due process, Goldsby was entitled to a hearing and an inquiry into the truth of his allegations[2] "unless it appears from the application that * * * [he] * * * is not entitled thereto." 28 USCA

1. It was alleged that under the Mississippi statutes, prospective jurors are to be selected from the lists of qualified voters and that although Carroll County, according to the 1950 Census, had a population of 15,449 persons of which 8,829 were Negroes, 5,300 of whom were by reason of age and educational qualifications eligible to qualify as voters, that at the time the indictment was returned against appellant and for a long time before, no Negro had ever appeared upon the voting lists and therefore none had been included on the lists of prospective jurors.

2. This will include the allegation that state remedies have been exhausted in accordance with 28 USCA 2254. On the present uncontroverted record this was met since the basic question had been presented to the highest Court of Mississippi and relief denied, Goldsby v. State, 86 So.2d 27, and an application for certiorari from the United States Supreme Court was prosecuted and denied, ...U.S....., 1 L.Ed. 2d 239. Darr v. Burford, 339 U.S. 200, 94 L.Ed. 761; Brown v. Allen, 344 U.S. 443, 97 L.Ed. 469.

2243. The ancient writ of habeas corpus is an extraordinary process which, as such, requires some particularity of pleading beyond that normally necessary in other civil cases,[3] but in the interests of justice and to provide the vindication of fundamental rights, the purpose for which the writ is designed, the pleadings of a prisoner should not be scrutinized for compliance with technical niceties, Rice v. Olson, 324 U.S. 786, 89 L.Ed. 1367; Hawk v. Olson, 326 U.S. 271, 90 L.Ed. 61, and may be amended even if insufficient in substance, Holiday v. Johnston, 313 U.S. 342, 85 L.Ed. 1392; 28 USCA 2242, FRCP 15.

Whether, on the hearing, the record will bear out that the constitutional issue has adequately been preserved, Adams v. United States, 317 U.S. 269, 87 L.Ed. 268, the application[4] with which we are here concerned alleged more than the mere fact that Negroes were systematically excluded from the jury lists. And in the present posture of this case, when no response has been made to the application for habeas corpus which was dismissed for failure to state grounds for relief, this court may take as true all facts well pleaded in determining whether the dismissal was proper. Hawk v. Olson, 326 U.S. 271, 90 L.Ed. 61; Lisenba v. California, 314 U.S. 219, 237, 86 L.Ed. 166; White v. Ragen, 324 U.S. 760, 89 L.Ed. 1348; Williams v. Kaiser, 323 U.S. 471, 89 L.Ed. 398; House v. Mayo, 324 U.S. 42, 89 L.Ed. 739.

[*Allegations of Ignorance*]

This makes the allegations of Paragraph 14 of the application of extreme importance. In Paragraph 14 Goldsby avers that "Because of petitioner's ignorance and the circumstances of his arrest and incarceration, and as a consequence of the customs, mores and usages of the State of Mississippi, Petitioner was not able to challenge[5] the competency and qualifications of the Grand Jury that was sworn and impaneled * * *." This allegation, considered in conjunction with those facts (see note 4, supra) averred which sufficiently set forth the speed in which the indictment was returned and appellant put on trial, at least permit a pleader's inference for proof that petitioner, an ignorant layman, had not had an adequate opportunity for counselling with his various counsel sufficient to enable him intelligently and deliberately to understand and approve the available or recommended courses of action, including the availability and desirability of urging defensive constitutional objections to the composition of the grand and petit juries. Whether, under the circumstances briefly

3. The Federal Rules of Civil Procedure have no application, other than by analogy, to habeas corpus proceedings unless by express statutory requirement. FRCP 81(a)(2). United States ex rel. Jelic v. Director of Immigration, 2 Cir., 106 F.2d 14.

4. Although the present record contains little more than the petition for writ of habeas corpus and the order dismissing it, the facts gleaned from the state court opinions, to which reference is made, and allegations appear to be that the murder indictment was returned by the Carroll County grand jury on November 8, 1954, arraignment being held that same day with trial set for November 10, only two days later. On the date set for trial, counsel previously engaged by a relative of appellant in St. Louis, withdrew from the defense for reasons which are not indicated, leaving appellant without counsel to aid in his defense. The trial court appointed counsel from a neighboring county to assume the defense and the trial was passed until the following day when another attorney engaged from the local bar by relatives of appellant joined the defense and the trial proceeded to conviction and sentence. An appeal was carried to the Supreme Court of Mississippi which affirmed the judgment and sentence of the trial court, Goldsby v. State, 78 So.2d 762. Up until this time, March 28, 1955, there had never been any assertion that the constitutional rights of appellant had been denied. At this point, counsel who had withdrawn from the case on the date originally set for trial re-entered the defense and applied for a writ of certiorari from the United States Supreme Court to the Supreme Court of Mississippi, for the first time urging the systematic exclusion of Negroes from the jury lists. When this application was denied, Goldsby v. State, 350 U.S. 925, 100 L.Ed. 809, Goldsby, on February 21, 1956, applied to the Supreme Court of Mississippi for a writ of error coram nobis or, in the alternative, habeas corpus, for the first time asserting in the state courts, the denial of due process of law. In denying the writ, the Supreme Court of Mississippi held that the denial of certiorari by the United States Supreme Court was res adjudicata of the constitutional question and that the application now came too late since no objection to the validity of the juries impaneled in the cause had been made at the time of the trial or on appeal. Goldsby v. State, 86 So.2d 27.

5. Apparently as an additional reason why he either did not, or did not have to, make the challenge to the juries, Goldsby further alleged that the statutes of Mississippi preclude questioning the validity or regularity of the selection or impaneling of any jury once it has been impanelled and sworn as any jury once sworn is deemed to be a legal one. Code of Mississippi, 1942, §§ 1784, 1798. But in its opinion denying petitioner's application for writ of error coram nobis, 86 So.2d 27, the Supreme Court of Mississippi pointed out that regardless of this statutory language, when a person is accused subsequent to the impaneling of the grand jury so that he has no opportunity to challenge the validity of the jury and a Federal Constitutional question is involved, that he is not precluded from moving to quash any indictment returned against him.

but sufficiently set forth, this was an adequate preservation of the constitutional issue, and, if not, whether it was sufficient to excuse the defect are matters to be determined upon the hearing.

[*Dismissal Erroneous*]

We therefore hold that this dismissal was erroneous and that the application should be determined upon a hearing. It is, of course, incumbent upon the applicant to carry the burden in a collateral attack upon a judgment, Williams v. Kaiser, supra; Walker v. Johnson, 312 U.S. 275, 85 L.Ed. 830; Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, but he is entitled to an opportunity to shoulder it. Hawk v. Olson, supra. But we think it important to point out—especially in the delicacy which unavoidably inheres as the Federal judiciary exercises its constitutional duty of determining whether state court criminal proceedings have offended Federal constitutional guarantees—that nothing said or unsaid, expressed or implied is an intimation, one way or the other, on the facts or what the District Court should or should not do or find on the hearing which we hold is required.

REVERSED.

REAL PROPERTY
Restrictive Covenants—Georgia

B. L. SECKINGER et al. v. City of ATLANTA et al.

Supreme Court of Georgia, October 11, 1957, 100 S.E.2d 192.

SUMMARY: An action was brought in a Georgia state court to enjoin the erection of a shopping center on property in Atlanta. The basis of the action was that an ordinance rezoning the property was void and that the erection of a shopping center to be used by both white persons and Negroes would violate the terms of a restrictive covenant on part of the property. The trial court denied the injunction. On appeal the Georgia Supreme Court affirmed. The court held that the use by persons of the Negro race of facilities of the proposed shopping center would not violate the terms of the restrictive covenant that "no person of any race other than the white race shall use or occupy any building or any lot."

SYLLABUS BY THE COURT

1. The rezoning ordinance of the City of Atlanta, approved December 5, 1956, amended the shape, boundary, and area of three zoned districts pursuant to valid statutory authority.

2. The restrictive covenant pertaining to use and occupancy, applicable to a small tract of the land involved, will not be violated by the erection of a shopping center wherein members of all races may trade and purchase articles.

(a) Restrictions upon the use of land which are vague, doubtful, and uncertain in meaning can not be enforced in equity.

The plaintiffs filed a petition in two counts against W. R. Wofford, as Building Inspector for the City of Atlanta, the City of Atlanta, Samuel Roberts Noble Foundation, Inc., and Lenox Square, Inc., to enjoin the erection of a shopping center on described property. Count one of the petition attacks as ultra vires, illegal, and void an ordinance of the city approved December 5, 1956, rezoning the property described to commercial use. It is alleged: that the ordinance does not amend the number, shape, boundary, or area of any district or districts; it attempts to declare that property in three districts is zoned C-1; it is contrary to law and the comprehensive zoning ordinance, in that it attempts to zone a specific tract of land within districts previously established, and it does not attempt to create a new district; it is illegal and void as constituting spot zoning.

Count two alleges that provisions of a restrictive covenant agreement entered into between the predecessor in title of the corporate defend-

ants and others, including the predecessor in title of one of the plaintiffs, to wit, that "No person of any race other than the white race shall use or occupy any building or any lot," and that "No noxious or offensive trade or activity shall be carried on upon the above mentioned lots or property, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood," applicable to a small part of the property rezoned, will be violated by the erection of a shopping center.

The trial judge denied an interlocutory injunction, and the exception is to that judgment.

OPINION

HEAD, Justice.

In the present case the plaintiffs seek to preserve the status of described property under a zoning ordinance of the City of Atlanta approved December 22, 1954. The general law authorizing "Zoning And Planning In Municipalities" (Ga.L. 1946, p. 191) was made applicable to the City of Atlanta by an act approved February 15, 1952 (Ga.L.1952, p. 2731). By section 1 of the 1946 act, municipalities are "empowered to make, adopt, promulgate, and from time to time, amend, extend, and add to" zoning regulations, and to divide the municipality "into districts of such number, shape, and area as may be deemed best suited" to carry out the purposes of the act. Section 9 of the 1946 act provides in part that "The governing authority of the municipality may from time to time amend the number, shape, boundary or area of any district or districts, or any regulation of, or within such district or districts, or any other provision of any zoning regulation." "Under the above provision of the 1946 act, the Mayor and Council of the City of Atlanta may amend the number of districts zoned, the shape, boundary, or area of zoned districts." Orr v. Hapeville Realty Investments, 211 Ga. 235, 85 S.E.2d 20, 24.

[*Zoning Ordinance*]

By an ordinance approved December 5, 1956, it is recited in the caption that it is to "amend the 1954 Zoning Ordinance of the City of Atlanta by changing from R-3 and R-4 (Single Family Dwelling District) and C-1 (Community Business District) to C-1 (Community Business District) property fronting 1069.8 feet, more or less, on the southeasterly side of Peachtree Road, beginning at the southeast corner of Lenox Road and Peachtree Road, N. E. depth, average 1900 feet." In section 1 of this ordinance it is provided that described property, approximately 70 acres, "now zoned as C-1 (Community Business District), R-3 (Single Family Dwelling District) and R-4 (Single Family Dwelling District) shall, in its entirety, be zoned as C-1 (Community Business District)."

From the quoted provisions of this ordinance, it indisputedly appears that the shape, boundary, and area of zoned districts were amended pursuant to constitutional and statutory authority. Orr v. Hapeville Realty Investments, supra; Neal v. City of Atlanta, 212 Ga. 687, 94 S.E.2d 867. In Neal v. City of Atlanta, supra, it was held that a rezoning of the same property here involved would not constitute spot zoning.

The cases of Mueller v. C. Hoffmeister Undertaking & Livery Co., 343 Mo. 430, 121 S.W.2d 775; Marshall v. Salt Lake City, 105 Utah 111, 141 P.2d 704, 149 A.L.R. 282; Kuchne v. Town Council of Town of East Hartford, 136 Conn. 452, 72 A.2d 474; Appley v. Township Committee of Township of Bernards, 128 N.J.L. 195, 24 A.2d 805; Leahy v. Inspector of Buildings of City of New Bedford, 308 Mass. 128, 31 N.E.2d 436; Whittemore v. Building Inspector of Falmouth, 313 Mass. 248, 46 N.E.2d 1016; Putney v. Abington Township, 176 Pa.Super. 463, 108 A.2d 134; cited by counsel for the plaintiffs, have been examined. In so far as these cases are in point with the present case on their facts or on the statutory law construed, they are not in conflict with the decisions of this court or the rulings here made.

[*Rezoning Power*]

The general law of 1946 vests in governing authorities of municipalities the power to rezone in the manner provided by the amending ordinance here involved. It does not appear that the rights of any of the plaintiffs have been violated. A benefit derived from public acts of government is not a legal right in perpetuity against the exercise of governmental power in the future. Morgan v. Thomas, 207 Ga. 660, 63 S.E.2d 659; Reichelderfer v. Quinn, 287 U.S. 315, 53 S.Ct. 177, 77 L.Ed. 331. It is not the business of the courts to control the discretion vested in municipal governments, where the acts com-

plained of are clearly within the powers granted. Schofield v. Bishop, 192 Ga. 732, 16 S.E.2d 714.

2. "As a general rule, the owner of land in fee has the right to use the property for any lawful purpose, and any claim that there are restrictions upon such use must be clearly established." David v. Bowen, 191 Ga. 467, 469, 12 S.E.2d 873, 874, and cases cited; Lawson v. Lewis, 205 Ga. 227, 52 S.E.2d 859.

[*Restrictive Covenant*]

The restriction relied upon in the present case, that "No person of any race other than the white race shall use or occupy any building or any lot," is not violated by the development of the property as a shopping center. The word "use" has many meanings, but as used in the restriction it means "to convert to one's service." Webster's International Dictionary (2d Ed.) p. 2806. The word "occupy" means "to take or enter upon possession of." Webster's International Dictionary (2d Ed.) p. 1684. The fact that a member of some race other than the white race might cross property used as a shopping center, or park a car in an area provided for such purpose, or enter into a store for the purpose of purchasing commodities, would not be a conversion of property to the "possession" or "service" of such individual within the meaning of the restrictive covenant.

[*Nuisance*]

The law defines a nuisance. Code, § 72-101. The operation of a lawful business in the manner authorized by law is not a nuisance. The provision that "No noxious or offensive trade or activity shall be carried on upon the above mentioned lots or property," is too vague, indefinite, and uncertain for enforcement in a court of equity by injunction, except in so far as these words may be included within the definition of a nuisance; and the mere anticipation of injury from the operation of a lawful business will not authorize the grant of an injunction. Davis v. Miller, 212 Ga. 836, 96 S.E.2d 498, and citations.

Judgment affirmed.

All the Justices concur.

INDIANS
Indian Lands—New York

JONES CUT STONE CO., Inc. v. The STATE of New York

Court of Claims of New York, September 26, 1957, 166 N.Y.S.2d 742.

SUMMARY: The plaintiff, a company engaged in quarrying stone in New York, brought a claim in the New York Court of Claims against the state for damages arising from the appropriation of an easement over quarry lands leased by the plaintiff from the Onondaga Indian Tribe. In its opinion awarding nominal damages to the plaintiff the court stated that the fee simple title to the reservation is owned by the state subject to its possession as common property of the Onondaga Tribe during the latter's existence. The court further stated, "The Indians are wards of the State. The Indians and the reservation are subject to treaties and the Indian Law. . . . The tribal custom of delegating plots of land to individual Indians for life occupancy still prevails. No partition has ever been made by the Onondagas under Section 7 of the Indian Law."

INDIANS
Indian Lands—South Dakota

L. D. PUTNAM et al. v. UNITED STATES of America

United States Court of Appeals, Eighth Circuit, October 14, 1957, 248 F.2d 292.

SUMMARY: The United States brought an action in federal district court to procure the cancellation of certain deeds and leases of Indian trust lands in Bennett County, South Dakota. The claim of the government was that the lands in question were Indian allotments within a reservation and were held in trust by the United States for the Indian allottees and their heirs, and that the defendants had induced the Indian owners of the beneficial interests in the lands to execute deeds and leases which were invalid. The defendants denied that the lands were Indian trust lands. The district court decided in favor of the government and the defendants appealed. The Court of Appeals for the Eighth Circuit affirmed, holding that the lands in suit are held in trust by the United States and are restricted as to alienation. The court stated, in part, "Therefore, the lands, in our opinion, continued to be and are now held in trust by the United States for the sole use and benefit of the heirs of the allottees, and are still under the control of Congress for all governmental purposes relating to the guardianship and protection of the Indians."

INDIAN RESERVATIONS
Jurisdiction—Oregon

James Quinton ANDERSON v. J. M. BRITTON, Sheriff.

Supreme Court of Oregon, November 13, 1957, 318 P.2d 291.

SUMMARY: Anderson, a member of the Klamath Indian Tribe, was indicted, tried and convicted of murder in an Oregon state court. The conviction was affirmed by the Oregon Supreme Court. Anderson then brought a petition for habeas corpus in a state court. The petition contended that the conviction was void because the state court was without jurisdiction to try an Indian for a crime committed on an Indian reservation. The trial court dismissed the petition and the petitioner appealed to the Oregon Supreme Court. The Supreme Court affirmed the dismissal, holding that an act of the United States of August 15, 1953, validly ceded jurisdiction over crimes committed by Indians within certain Indian reservations to the state. [See also *Vermillion v. Spotted Elk*, 85 N.W.2d 432, 2 Race Rel. L. Rep. 1141 (N.D., 1957).]

KESTER, Justice.

This is a habeas corpus proceeding against the sheriff of Klamath county. The writ was issued and the sheriff made his return showing that plaintiff was held under an order of commitment pursuant to a conviction of second degree murder. Plaintiff made replication to the effect that the conviction was void because the state court was without jurisdiction; and in this connection he alleged that plaintiff is a tribal Indian, that the alleged homicide was committed, if at all, within the Klamath Indian reservation, and that the federal courts have exclusive jurisdiction over the alleged offense, notwithstanding Public Law 280 of the 83rd Congress. The trial court sustained a demurrer to the replication, plaintiff refused to plead further, the writ was dismissed, and plaintiff now appeals.

The facts with respect to the homicide are detailed in State v. Anderson, 207 Or. 675, 298 P.2d 195, wherein plaintiff's conviction was affirmed.

[*Part of the Court's opinion, dealing with the*

availability of the writ of habeas corpus and matters of procedure, is omitted here.]

* * *

[*Importance of Question*]

We gather from statements made upon the argument that counsel for plaintiff had in mind at the trial the jurisdictional question now presented, but deliberately refrained from raising it until after the decision on appeal from the conviction. Under these circumstances we would not ordinarily consider the matter upon habeas corpus. However, because of the public importance of the question (involving, as it does, a large field of law enforcement), we feel warranted in considering the case on its merits, notwithstanding plaintiff's failure to exhaust his previous remedies and his obvious gambling on the outcome of the prior case.

[*Act of August 15, 1953*]

Plaintiff challenges the constitutionality of Public Law 280 of the 83rd Congress (67 Stat. 588), approved August 15, 1953, which enacted a new section, known as § 1162 of Title 18 United States Code. Its applicable portion provides:

> "§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country
>
> "(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the state:
>
> "State of Indian country affected
>
> * * * * * * *
>
> "Oregon ..... All Indian country within the State, except the Warm Springs Reservation."

Public Law 280 also conferred on the state jurisdiction over civil causes between Indians or to which Indians are parties which arise in the same areas of Indian country; it had certain saving clauses with respect to Indian property and with respect to treaty rights for hunting, trapping or fishing; it rendered inapplicable certain provisions of federal law dealing with Indian offenses; and it concluded with the following:

> Sec. 6. "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."
>
> Sec. 7. "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." 28 U.S.C.A. § 1360 note.

[*Race of Defendant*]

Defendant's demurrer to the replication admits that plaintiff is of Indian blood, that he was and is a duly and regularly enrolled member of the Klamath tribe of Indians, that he resided upon the Klamath Indian reservation in Klamath county, Oregon, that the Klamath tribe is a recognized tribe or community of Indians organized under a constitution and bylaws approved by the Secretary of the Interior and maintaining a tribal government, and that the alleged homicide was committed, if at all, within the boundaries of the Klamath Indian reservation in Klamath county, Oregon.

The first degree murder statute (ORS 163.010), under which plaintiff was indicted, and the second degree murder statute (ORS 163.020), under which he was convicted, both refer to "any person" and "every person." There can be no doubt that such statutes would be applicable to plaintiff, except for the circumstance

that he was an Indian and that the act occurred in Indian country. No further legislation or constitutional provision dealing with this subject has been adopted in Oregon since the enactment of Public Law 280. Therefore the question is presented whether Public Law 280 is valid, and whether it has the effect of removing the federal government from the field and of conferring jurisdiction over this subject on the courts of Oregon, without further action by the state.

[*California Decision*]

At the outset we note that the validity of Public Law 280 was assumed by the California Supreme Court in Application of Carmen, supra [313 P.2d 817 (Calif., 1957)]. That case arose prior to the effective date of the Act, at a time when jurisdiction over Indian offenses in Indian country was clearly vested in the federal courts, but the Act (which applied to California as well as Oregon) became effective before the final decision in the case. In referring to it the California court said:

> "• • • petitioner's claims are based entirely upon federal statutes (§§ 1151, 1152, 1153, 3242, Title 18 U.S.C.A.), the effect of which has been changd since petitioner committed his offenses, by legislation giving the courts of this state unquestioned jurisdiction over offenses committed in 'All Indian country within the State.' § 1162, Title 18 U.S.C.A., as amended Aug. 24, 1954."

However the opinion does not indicate that the question of validity was presented in that case. We have found no case since enactment of Public Law 280 which directly passes upon its validity in the respects here concerned.[1]

Plaintiff claims that the power to define and punish crimes committed by Indians on Indian reservations is exclusively and inherently federal. Based on this premise, he then argues that the federal power cannot constitutionally be delegated to the states. He also argues that Public Law 280 is not self-executing, but requires implementing legislation by the state; and that any such legislation by the state would itself be invalid as lacking in the uniformity, because under Public Law 280 the Warm Springs reservation would have to be excepted.

The latter arguments can be disposed of quickly. ORS 131.210 (adopted in 1864) provides:

> "Every person, whether an inhabitant of this state or any other state, territory or country, is liable to punishment by the laws of this state for a crime committed by him in this state, except where such crime is by law cognizable exclusively in the courts of the United States."

[Earlier Statutes]

Prior to Public Law 280, murder by an Indian, within the Indian country was "cognizable exclusively in the courts of the United States." Title 18 U.S. Code, provides:

> § 1152: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> "This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."
>
> § 1153: "Any Indian who commits • • • murder • • • within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."
>
> § 3242: "All Indians committing any of the following offenses, namely murder, • • • on and within the Indian country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

Public Law 280 provides that "the provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian

1. In Klamath & Modoc Tribes, etc., v. Maison, D.C. 1956, 139 F.Supp. 634, the U. S. District Court for Oregon held that Public Law 280 did not extend the hunting and trapping laws of the state of Oregon to Indians upon the Klamath reservation. Such rights were estalished by the treaty of 1870, 16 Stat. 707 and were expressly reserved by Public Law 280.

country listed in subsection (a) of this section," but it does not mention § 3242. Plaintiff argues that the failure to mention § 3242 leaves it unimpaired, with the effect that the federal courts still have exclusive jurisdiction, notwithstanding Public Law 280. However, § 3242 is essentially procedural, and since plaintiff's construction would render Public Law 280 nugatory, we have no hesitation in holding that § 3242 was repealed by implication, to the extent that Public Law 280 is applicable.

[*Statute Valid*]

Hence if Public Law 280 is valid, no further legislation was required to render plaintiff subject to the state laws dealing with murder. Sections 6 and 7 of Public Law 280 were apparently intended for states whose existing constitutions and statutes were not adequate to fill the gap left by federal withdrawal, but such is not the case in Oregon. Since no implementing legislation is necessary, and the existing laws as to murder do not distinguish between Indians and others, we will not speculate as to the constitutionality of statutes not yet enacted.

[*Power of U. S. Over Indians*]

The real question involves consideration of the fundamental nature of the federal power over Indian affairs. If that power is inherent solely in the federal government, to the necessary exclusion of the state, then the question of delegation may become important. But if the state has residual power over Indians and Indian territory, which is merely in suspension so long as the federal government chooses to occupy the field, then a withdrawal by the federal government does not vest any new power in the state but merely removes an impediment to the exercise of pre-existing power.

The United States Constitution contains no direct grant of power to the federal government over criminal offenses by Indians or in Indian territory. Nevertheless it has been universally recognized that the federal government has plenary power over Indian affairs, at least so long as Congress chooses to exercise it. That power has been variously thought to stem from: (1) the power to regulate commerce with the Indian tribes (Art. I, § 8, cl. 3); (2) the treaty-making power (Art. II, § 2, cl. 2) and the corollary power to implement treaties by legislation; (3) the power over federal property (Art. IV, § 3, cl. 2); (4) the war powers (Art. I, §, cl. 11 et seq.); (5) the power to admit new states (Art. IV, § 3, cl. 1) and inferentially to prescribe the terms of such admission; and (6) the power to make expenditures for the general welfare (Art. I, § 8, cl. 1). See Cohen, Handbook of Federal Indian Law, ch. 5 (U. S. Dept. of Interior publication).

Whatever its theoretical source, the exercise of federal power has also had a practical basis. In United States v. Kagama, 118 U.S. 375, 383-385, 6 S.Ct. 1109, 1114, 30 L.Ed. 228, in sustaining the validity of the federal statute which gave the federal courts exclusive jurisdiction over crimes by one Indian against another within an Indian reservation (23 Stat., ch. 341, p. 362, § 9, p. 385, March 3, 1885, the predecessor of what is now 18 U.S.C.A. § 1153) the court made the following statement which has since been quoted many times:

> "It seems to us that this is within the competency of congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States,—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing with the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by this court, whenever the question has risen.
>
> * * * *
>
> "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theatre of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes." (Italics in original.)

Plaintiff relies heavily on the statement in the Kagama case, supra, that "it [the power over Indians] never has existed anywhere else [than in the federal government]." That statement, however, cannot be accepted without qualification.

In Red Hawk v. Joines, 129 Or. 620, 634, 278 P. 572, 577, where this court upheld jurisdiction in the state court of a replevin action by an Indian against a white man arising out of the taking of some cattle on the Umatilla Indian reservation, the court adopted the opinion of Circuit Judge James Alger Fee, in which it was said:

> "It is a familiar principle that where Congress has the right to take over exclusive jurisdiction, and has not covered the particular subject under consideration, the power of the state courts is upheld until Congress acts. See Sioux Remedy Co. v. Cope, 235 U.S. 197, 35 S.Ct. 57, 59 L.Ed. 193; Territory of New Mexico ex rel. E. J. McLean & Co. v. Denver etc. R. Co., 203 U.S. 38, 27 S.Ct. 1, 51 L.Ed. 78; Sligh v. Kirkwood, 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835.
>
> "It does not follow because the authority of the federal government over the Indians and the Indian country is supreme, that the state and territorial government have no jurisdiction whatever over them, and over Indian Reservations. In the absence of provisions to the contrary, the lands embraced therein occupied by Indian tribes are a part of the state territory, and subject to its jurisdiction, except so far as concern the government and protection of the Indians themselves, and for purposes relating to treaties and agreements between the United States and Indians, in which respects the jurisdiction of the United States is exclusive. Wagoner v. Evans, 170 U.S. 588, 18 S.Ct. 730, 42 L.Ed. 1159; Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740; Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419; Utah & Northern Ry Co. v. Fisher, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542."

The same qualification was expressed in State v. Columbia George, 39 Or. 127, 147, 65 P. 604, 610, which held that the exclusive power over Indian crimes on Indian reservations, which was vested in the federal courts by the Act of 1885, 23 Stat. 362, was not altered by the Dawes Act of 1887, 24 Stat. 388, which allotted public lands to Indians and conferred citizenship on the allottees. In the opinion Mr. Justice Wolverton stated:

> "The state courts have never had jurisdiction over the Indians within the Indian country or upon Indian reservations, *except as and in so far as the general government has relinquished the supervisory control and authority over them.*" (Italics ours.)

The history of Indian affairs, particularly in recent years, has shown a decided trend toward the emancipation of the Indians, the withdrawal of federal control, and an attempt to assimilate the Indians into the community life of the various states. Some of the problems attendant upon that policy recently prompted the Oregon State Bar to appoint a special committee on the legal rights of Indians. The report of that committee in 1956 contained an excellent and concise summary of the trend, and excerpts from that report are attached to this opinion as an appendix. Further reference to the general aspects of the problem is unnecessary.

Assuming, as can be inferred from the Kagama case and similar language in other cases, that the federal power over Indian affairs (or at least the exercise of it) rests in part on considerations of necessity or expediency, because of the dependent relationship of the tribes to the United States, the need for such control naturally diminishes as the Indians progress away from their primitive state.

[*Political Question*]

The determination of when the wardship status of Indians is to be terminated is a legislative or political question and not for the courts. In United States v. Nice, 241 U.S. 591, 598, 36 S.Ct. 696, 697, 60 L.Ed. 1192, which upheld the federal prohibition of liquor traffic with Indians whose land allotments were still held in trust, the court said:

> "Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emanci-

pation shall at first be complete or only partial."

It is clear that the power over Indians, as such, is not so inherently federal as necessarily to exclude the states, because Indians outside of "Indian country" are subject to the general criminal laws of the states. Tooisgah v. U.S., 10 Cir., 1950, 186 F.2d 93.

And likewise the federal power over Indian country is not necessarily exclusive, because crimes by non-Indians committed on Indian reservations are subject to state laws. United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869; People of State of New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261.

These examples illustrate that the inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has pre-empted the field. It follows therefore that the federal government may withdraw from the field and turn the subject matter back to the states, when it chooses to do so.

[*Treaty*]

Plaintiff does not point to any specific clause of the constitution which he claims is violated by Public Law 280. Instead he urges that the act is invalid because there is no constitutional authority to sustain it. In this connection he says that the federal power over the Klamath Indians and the Klamath reservation is based solely upon the Treaty of February 17, 1870, between th United States and the "Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians" (16 Stat. 707).

By that treaty the tribes ceded to the United States all their claim to certain described lands, and in turn the United States set aside a portion of those lands as an Indian reservation. Among other provisions, Article IX of the treaty provided:

> "The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct."

Plaintiff claims that the tribe agreed to submit only to the laws and regulations of the United States, and not to those of the state of Oregon; and that any powers not surrendered to the United States remained in the tribe, so that upon relinquishment by the federal government, the power reverts to the tribe itself. Plaintiff's argument negates any authority in either state or federal government, except as derived from the treaty.

[*Tribal Sovereignty*]

It is true that various Indian tribes were for a time treated as having some aspects of sovereignty, that they were dealt with by means of treaties until the Act of March 3, 1871 (16 Stat. 566, 25 U.S.C.A. § 71, see Appendix, infra), and that treaties between them and the United States have been held superior to state laws. E.g. Worcester v. Georgia, 6 Pet. 515, 31 U.S. 350, 8 L.Ed. 483.

But it has also been held that the power of congress over Indian affairs is plenary, that it cannot be limited by treaty, and that an Indian treaty may be abrogated by congress, so long as individual rights acquired under the treaty are not destroyed. Lone Wolf v. Hitchcock, 187 U.S. 553, 566, 23 S.Ct. 216, 47 L.Ed. 299; Choate v. Trapp, 224 U.S. 665, 671, 32 S.Ct. 565, 567, 56 L.Ed. 941. In the latter case the Supreme Court said:

> "* * * the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States."

It follows that the Treaty of 1870 did not bind the United States to maintain its police power perpetually over the tribe, to the exclusion of the state. On the contrary, the treaty (so far as is here concerned) was on a parity with the federal criminal laws relating to Indians on Indian reservations, and either could be modified by subsequent enactment. The treaty was not the

source of federal power, but it was merely a means by which the existing, but dormant, federal power was exercised. Upon its exercise the rights of the state were suspended until such time as the federal pre-emption should be relinquished, and the relinquishment could be accomplished by congressional act. What then, were the rights of the state prior to the Treaty of 1870?

[*Admission to Union*]

By the act admitting Oregon as a state (February 14, 1859, 11 Stat. 383) Oregon was received into the Union "on an equal footing with the other States in all respects," and there was no exclusion of any jurisdiction over either Indians or Indian territory. The operation of federal statutes then, as now, being limited to "Indian country" (Act of March 27, 1854, 10 Stat. 270, ch. 26, § 3) and there being no "Indian country" defined as such with respect to the Klamaths prior to 1870, it follows that between 1859 and 1870 the Klamaths, and the area later to become the Klamath reservation, were subject to state jurisdiction.

Therefore, if Public Law 280 in fact conflicts with the Treaty of 1870 (which it is unnecessary to decide), the effect of the statute was to abrogate the treaty. Plaintiff has no such vested right in being tried by the federal, rather than the state courts, as would entitle him to complain of the abrogation. And the withdrawal of federal control leaves the subject in the hands of the state, where it was prior to the treaty.

We hold that Public Law 280 of the 83rd Congress is not unconstitutional, that under it the state of Oregon had criminal jurisdiction over this offense, and the demurrer to plaintiff's replication was properly sustained.

Affirmed.

APPENDIX

REPORT OF OREGON STATE BAR COMMITTEE ON LEGAL RIGHTS OF INDIANS, 1956.

"1. Preliminary comment

"The legal status of Indians in the United States is unique. In earlier years, they were treated as neither citizens nor aliens. Nor were their tribes regarded as 'nations,' as that term is used in international law. Their relationship, either as individuals or as tribes, to the Government of the United States could hardly be defined in conventional legal terms. As observed by Chief Justice Marshall some 125 years ago, 'the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.' (Cherokee Nation v. Georgia, 5 Pet. 1, 17 [30 U.S. 1, 8 L.Ed. 25])

"Prior to 1871, the civil rights of Indians were governed largely by treaties made by the United States with the various Indian tribes. But by an act passed March 3, 1871 [25 U.S.C.A. § 71], Congress terminated the prior method of dealing with the Indians through treaties and provided that:

> " 'hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.' (16 Stat. 566)

Thereafter, the United States governed the Indians directly, by the exercise of its legislative powers, rather than by contract, except that the obligations of treaties made prior to March 3, 1871 were recognized as binding. However, for practical reasons in a few instances, contracts were made with tribes in certain areas. Nevertheless, the 1871 Act marked the first major change in the attitude of the United States toward the Indians.

"2. Citizenship

"The second major change in governmental attitude toward Indians, which came about more slowly, related to the status of Indians as citizens. In 1884, the Supreme Court held that an Indian was not, merely by reason of birth within the United States, a citizen of the United States within the meaning of the 14th Amendment. (Elk v. Wilkins, 112 U.S. 94 [5 S.Ct. 41, 28 L.Ed. 643]).

"But subsequently, by a series of acts beginning in 1887, Congress extended citizenship to certain Indians who had 'adopted the habits of civilized life' (24 Stat. 390), to 'every Indian in Indian Territory' (31 Stat. 1447), to all Indians who had served in the armed forces of the United States in World War 1 (41 Stat. 350), to 'all members of the Osage Tribe of Indians' (41 Stat. 1250), and finally in 1924 to 'all noncitizen Indians born within the territorial limits of the United States.' (43 Stat. 253)

"3. Property rights

"The United States always has exercised some control over the property rights of Indians. The constitutional authority for the exercise of that power has been sustained on various practical grounds. In 1942, the Supreme Court stated it in this way:

> " 'From almost the beginning, the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. * * * This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.' (Board [of County Com'rs of Creek County] v. Seber, 318 U.S. 705, 715 [63 S.Ct. 920, 925, 87 L.Ed. 1094])

"And the court in that case, following earlier decisions along the same line, held that 'the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government.' ([318 U.S. at] p[age] 718 [63 S.Ct. at page 927]) The contemplated surrender of that control created the problem which prompted the appointment of this committee.

"4. Termination of Federal control

"While Congress may not abdicate its constitutional power 'to regulate commerce * * * with the Indian tribes' (Art. I, sec. 8), it is settled that Congress may terminate the guardianship of the United States over the individual Indian and completely emancipate him from all Federal control not exercised over other citizens. For some fifty years, Congress has been moving gradually toward that end, dealing separately with particular tribes, one at a time.

"In 1954, Congress passed four separate acts relating to Indians of four separate tribes. One act dealt with the Menominee Tribe in Wisconsin (68 Stat. 250), another with the Ute Tribe in Utah (68 Stat. 868), a third with the Klamath Tribe in Oregon (68 Stat. 718), and the fourth with the Western Oregon tribes (68 Stat. 724). And there are now pending before the 84th Congress bills for similar acts relating to the Wyandotte Tribe (S. 3970) [70 Stat. 893], the Peoria Tribe (S. 3968 and H.R. 11672) [70 Stat. 937], and the Ottawa Tribe (S. 3969 and H.R. 11670) [70 Stat. 963].

"In substance, the 1954 Acts and the pending bills follows the same general pattern. Therefore, specific reference will be made only to the act relating to the Klamath Indians. It stated that its purpose was to terminate 'Federal supervision over the trust and restricted property of the Klamath Tribe of Indians' and to terminate 'Federal services furnished such Indians because of their status as Indians.' The body of the act, which is too long even to summarize here, sets forth the various steps to be taken to accomplish that purpose.

"The provisions with which we are presently concerned (1) give to each member of the tribe the right to elect 'to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate in the tribal management plan' outlined in the act, (2) direct the Secretary of the Interior, when the termination plan is completed, to issue a 'proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has [been] terminated,' and (3) declare that thereafter 'all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.' The act declared the intention of Congress to accomplish the complete termination of Federal control 'at the earliest practicable time and in no event later than four years from the date of this Act.' "

FAMILY RELATIONS
Birth Certificates—Louisiana

STATE of Louisiana ex rel. Ralph DUPAS v. City of NEW ORLEANS et al.

Civil District Court for the Parish of Orleans, Louisiana, October 31, 1957, No. 355-877, Div. B, Docket #5.

SUMMARY: Dupas, a professional boxer, brought a proceeding in a Louisiana state court to require the City of New Orleans to issue him a delayed birth certificate showing his place of birth to be New Orleans and his race as "white" or caucasian. The city contested the proceeding and presented evidence designed to show that Dupas was born in another parish and that his race is "colored" or Negro. Dupas presented evidence tending to sustain his contention. The court found in favor of Dupas and issued a writ of mandamus to require the city to issue the birth certificate as requested. A petition for new trial was overruled. (A 1956 Louisiana statute prohibits interracial participation in sporting events, including boxing. See Act 579, 1956, 1 Race Rel. L. Rep. 953.)

VIOSCA, J.

REASONS FOR JUDGMENT

Relator, Ralph Dupas, has brought this mandamus proceeding requesting that the City of New Orleans be directed to issue a delayed birth certificate reflecting his place of birth as New Orleans and his race as white, or caucasian. The City filed exceptions to the jurisdiction of the Court ratione materiae and exceptions of no right of action and no cause of action. The exception of no cause of action was overruled, but ruling on the exceptions to the jurisdiction and of no right of action were reserved pending the introduction of evidence, inasmuch as these exceptions attack the merit of Relator's case.

In support of Relator's contention that he was born in New Orleans, the primary evidence introduced was the testimony of Mrs. Harold J. Powell, a white friend and neighbor of Relator's mother in the year 1935, that she actually observed the birth in Mrs. Dupas' house at 620 Mandeville Street, New Orleans, on the evening of October 14, 1935, shortly after she and Mrs. Dupas had returned from a neighborhood movie. (V. 1, p. 13). Mrs. Powell, who appeared to be in every respect a straight-forward honest and credible witness said that she immediately summoned the mid-wife, a Mrs. Legendre, who had been previously employed by Mrs. Dupas. (V. 1, p. 13). Enos V. Russell testified that his half sister, Mrs. Loretta Legendre, a graduate midwife attended Mrs. Dupas during her pregnancy with Ralph, (V. 2, p. 28). At that time Russell knew Mrs. Dupas personally, she lived on Mandeville Street, and the confinement was at Mrs. Dupas' house, rather than at his sister's maternity home, 713 Elysian Fields. (V. 2, p. 28). The witness, who testified that he "attended to a lot of his sister's business", (V. 2, p. 28), remembered Ralph's birth particularly, because it was shortly before Armistice Day, 1935, (V. 1, p. 29), the date of his own son's birth.

[*Parents' Testimony*]

In addition to the foregoing evidence, Evelyn Dupas, Relator's mother, stated that Ralph was born in a house on Mandeville Street, (V. 1, p. 52), and Peter Dupas, Relator's father, testified that he lived in New Orleans all his life, (V. 6, p. 68), and that all his children including Relator, were born in New Orleans. (V. 6, p. 71). Josephine St. Ann Duplessis, who says she was the foster mother of Evelyn Foto Dupas, testified that Evelyn Foto, Relator's mother, married Peter Dupas and immediately moved to New Orleans. (V. 2, p. 27).

Christophe Duplessis, one of defendant's witnesses, first testified that Evelyn moved from their Plaquemines Parish home upon her marriage to Peter Dupas and that all of her children were born in New Orleans. (V. 2, p. 119). After extensive impeaching testimony and evidence, however, the witness changes this story. (V. 3, p. 13).

[*Church Records*]

A baptismal inscription on the records of Saints Peter and Paul Church reflects the bap-

tism of Ralph Dupas, son of Peter Dupas and Evelyn Foto on November 27, 1935, the birth therein recorded as having occurred on October 14, 1935. There is no notation as to the place of birth. (V. 6, p. 33). And consistent with the "rule of the church", as related by Rev. Father Patrick Cunningham, (V. 6, p. 30), that baptism takes place in the ecclesiastical parish in which the child is born, there is a presumption that Relator was born within the limits of Saints Peter and Paul's Parish, which is in the City of New Orleans.

Additionally, Orleans Parish School Board records on Ralph Dupas, beginning in 1941, show the birth of Relator as having occurred in the City of New Orleans, (V. 2, p. 81).

[*City's Evidence*]

On the other hand, the City's contention that Relator was born outside of New Orleans, (Davant, Plaquemines Parish, Louisiana) is supported primarily by a birth registration of one "Ralph Duplessis", born of Peter Duplessis and Evelyn Duplessis on October 15, 1935, in Davant, Louisiana. (V. 2, p. 13 and City 1). This is significant inasmuch as Peter Dupas was identified by some of the City's witnesses as one "Peter Duplessis" a trapper in Plaquemines Parish (see testimony of Sidney Duplessis, V. 6, p. 44, 47, Lucretia Gravolet V. 3, p. 38, and John Ansardi, V. 6, p. 78) and since Peter Dupas has apparently been known as Peter Duplessis (City L, Saint Katherine's Church baptismal entry of Pierre Theodore Duplessis, and City Q-2, Orleans Parish School record of one "Peter T. Duplesi"). However, in view of the testimony elicited with respect to the preparation of the birth record of Ralph Duplessis, City 1, it is inadmissible as an official public record. Mrs. Lucretia Gravolet, the registrar whose signature purportedly appears at the bottom of this certificate, admitted that her son, an eighteen year old boy who had no official position as registrar or deputy registrar at the time, may have signed her name, inasmuch as the notation "Per B.C.G." clearly appears beneath the signature on the original document. Mrs. Gravolet had specifically identified this very signature as her own shortly before the Court called her attention to the notation. An examination of the original document in light of Mrs. Gravolet's testimony leaves no doubt that her son who held no official position actually signed this document for her and registered this alleged birth. An additional irregularity in the preparation of this document was noted by the testimony of Mrs. Herbert Duplessis, the midwife who although she had no independent remembrance of the occasion or the identity of the individuals nevertheless identified the document and confirmed the deliveries (V. 3, p. 96, City 1 and City 2) of Peter Duplessis and Ralph Duplessis. She stated that she filled in all of the certificate with the exception of the race, which she left to the registrar, Mrs. Gravolet. (V. 3, p. 90). The latter, however, denied that she inserted the race. (V. 3, p. 48).

Other evidence of the birth of Relator in Plaquemines Parish is largely circumstantial. Heard Ansardi saw Evelyn Dupas, whom he identified as Evelyn Duplessis, pregnant in Plaquemines Parish. (V. 3, p. 108). John Ansardi understood that Peter Dupas, Sr., whom he identified as Peter Duplessis, "had children" when he worked for the witness's brother in Plaquemines Parish. (V. 6, p. 78). Also, Mrs. Lucretia Gravolet, who was an extremely biased witness, observed the pregnancy of Evelyn Dupas, whom she identified as Evelyn Duplessis, before the birth of the child, Ralph Duplessis, registered as born in Plaquemines Parish, October 15, 1935 (City 1).

[*Prior Application*]

The only other matter that indicates that Relator was born outside of New Orleans is the 1954 application for delayed birth registry of Ralph Dupas in Saint Bernard Parish, submitted by Relator to the State Board of Health and which contains affidavits of Relator and his mother that he was born in Saint Bernard (City 32, City 31). However, a reasonable explanation as to how this came about was presented by Relator's attorney, who stated that he prepared the affidavits from erroneous information contained in a baptismal certificate, after having Relator sign in blank. Mrs. Dupas, who testified that she is illiterate (V. 1, p. 51) although she can write her name, stated that she was unaware of the contents of her affidavit. (V. 1, p. 70). However, it cannot be disputed that Relator was not born in St. Bernard Parish.

After a careful consideration of all of the evidence bearing on the place of Relator's birth, it is the opinion of this Court that a preponder-

ance of the evidence favors Relator's contention that he was born in the City of New Orleans.

[*Establishing Race*]

The next point to be considered is the race or color of Relator. The principle of law with respect to degree of proof required in the present case depends largely upon whether Relator has been accepted as a member of the white or caucasian race during his lifetime. Evidence on this point seems overwhelmingly in support of an affirmation of the foregoing question. Relator is a lifelong resident of the City of New Orleans. (V. 1, p. 33). Since kindergarten, which he entered at the age of 5, and continuously through grammar school and high school, he has been registered and accepted as white in the white schools of the City of New Orleans. (V. 2, p. 81, V. 1, p. 33). He has during his lifetime availed himself of the public facilities reserved to members of the caucasian race. (V. 1, p. 44, 45). He has been accepted by schoolmates, neighbors and associates, as a white man. (V. 2, p. 91).

To the contrary, there is only scant evidence that upon infrequent vacation or week-end trips to Plaquemines Parish he was seen by Mrs. Gravolet and Heard Ansardi visiting Josephine St. Ann Duplessis (V. 3, p. 41) and her family.

[*Proof Required*]

Determining that Relator has been accepted as a white man, this Court is constrained to apply to the evidence presented on the question of race, the principle of law with respect to degree of proof announced in the Louisiana Supreme Court decision, Sunseri v. Cassagne, 191 La. 209, 185 So. 1 (1938), and as construed in the Louisiana Court of Appeal cases, Orleans circuit, State ex rel. Treadaway v. La. State Board of Health, 56 So.2d 249 (La. App. 1952) and Green v. City of New Orleans, 88 So.2d 76 (La. App. 1956). The principle, as deduced from the Sunseri case by the Orleans Court of Appeals, is that the litigant, who has been commonly accepted as being caucasian, should not be declared a member of the negro race unless all the evidence adduced leaves no room for doubt that such is the case. And this has been construed in the Treadaway case, *supra*, to mean that the proof in such case should be even more convincing than that which is necessary in such cases as must be proved 'beyond a reasonable doubt.'

The evidence with respect to Relator's race will now be analyzed in the light of this principle of law.

Relator contends that his mother is Evelyn Foto, caucasian, a foundling left with Josephine St. Ann Duplessis at a very early age. This contention is based almost exclusively on the testimony of Josephine St. Ann Duplessis, who unequivocally denounced maternity of this child, Evelyn. (V. 2, p. 45). Additionally, Evelyn Dupas testified that she was told of this at a very young age by Josephine. (V. 1, p. 51).

There is substantial evidence in the record indicating that Josephine St. Ann and/or her two husbands, Mathurin Clebert Duplessis and Myrtille Duplessis, as well as their natural children, are of colored ancestry. (City, 6, 7, 8, 11, 12, 13, 16, 17, 18, 19, 21 and 38). Consequently, Relator's position relative to color on his maternal line lies squarely on the veracity of the testimony of Josephine St. Ann Duplessis.

[*Mother's Race*]

In support of Relator's contention, it is noted that Mrs. Evelyn Dupas appears to be a white woman. Her hair is straight and her complexion is not dark. This was apparently the opinion of the late Mr. P. Henry Lanauze, formerly Registrar of Births, City of New Orleans, noted for his careful scrutiny in these matters, who personally took the affidavits of Mrs. Dupas that her children were white (City 28, City 29). Likewise, Mr. W. J. Prudhomme, Deputy Recorder in 1941, accepted Mrs. Dupas' affidavit that her child was white (City 27). Additionally, three different doctors and/or their assistants accepted Mrs. Dupas' assertion that her children were white (City 24, City 25, City 26). And Mrs. Dupas has been accepted as white from the time she entered the City of New Orleans. (C. 1, p. 14).

It should be noted that the recent changes by Mrs. Drake, the present Registrar, with respect to the race of Mrs. Dupas' children does not alter the fact that the initial registrations were white and accepted as such by the appropriate public officials.

[*Father's Race*]

On his paternal side there is likewise evidence that Relator is of caucasian ancestry. To begin

with Peter Dupas, Sr., has the appearance of one being of dark spanish, rather than negro ancestry, and this is attributable in part to his lifetime employment on vessels at sea. During the last 15 years he has been employed as a tugboat operator for M. J. Walsh, 509 Magazine Street, New Orleans.

His parents, Simon John Dupas and Louise Revon, residents of the City of New Orleans at least as far back as 1925 (V. 1, p. 16) were registered voters residing at 624 Congress Street, New Orleans, in 1928 (Relator #R, Relator #S). On the voting registration records their race is shown as white. Particularly significant also is the fact that Peter Dupas, Sr.'s father and mother were registered as white in their death certificates issued by the New Orleans Board of Health and their funerals were handled by white undertaking establishments. (Relator #1, Relator #2). Furthermore, there is a San Antonio, Texas, Department of Health death certificate on Gaspar Dupas, brother of Peter Dupas, Sr., showing his race as white. (Relator #Z).

Relator's father testified that he has lived only in New Orleans and then only as a white man (R. 6, p. 64, 68). This is supported by the fact that he was registered (as Peter Duplesi) at St. Phillip white boy's school in the City of New Orleans in the year 1919. (V. 6, p. 94, City Q-2). His sister, Thelma, attended McDonough #15, a white girl's school in the year 1917 (City R-1). Their residences on these school records are listed variously as Chartres, Burgundy, Ursuline and Decatur Streets, all within the City of New Orleans. Also, Relator's father, Peter Dupas, Sr., was a seaman at the age of 21, shipping out of New Orleans (Relator X-10).

It should be noted at this point that there is absolutely no evidence that Louise Revon was colored and there is no evidence that Simon John Dupas (or Duplessis) was in any way related to the Duplessis family to which either Mathurin Clebert Duplessis or Myrtille Duplessis belonged. Consequently, none of the City's extensive record evidence on the race or color of ascendants or descendants of these last mentioned persons is of any value in determining the race of Simon Dupas (or Duplessis) and his son, Peter Dupas, Sr. (or Duplessis), Relator's father.

[*City's Evidence*]

The City, of course, has presented significant evidence on the question of Relator's race.

Evelyn Dupas was identified by several people as Evelyn Duplessis, daughter of Josephine St. Ann Duplessis, a member, as a young child, of Josephine's household (L. Gravolet, V. 3, p. 34; J. Ansardi V. 6, p. 78); and extensive evidence was introduced to prove that Josephine St. Ann Duplessis and her natural children were colored (Exhibits City 8, 17, 18 and 19). However, none of this is significant if, as alleged by Relator, Evelyn is not a natural child of Josephine.

The most important piece of evidence on Evelyn's race, presented by the City, was the original baptismal entry of Evelyn on the records of St. Thomas' Church, Pointe-a-la-Hache. This entry, if trustworthy, tends to refute (though not conclusively) the "foundling" story told by Josephine St. Ann Duplessis, inasmuch as it shows Evelyn to be the legitimate daughter of Mathurin Klebert Duplessis and Josephine St. Ann, and, as it reflects the baptism as being only 62 days after the alleged birth, both contrary to the testimony of Josephine (City "I"). However, this entry is questionable. All of the marginal notations with the exception of "No. 18235 Evelyn Agnes Duplessis" appear to be in bright ink different from the ink used in the original baptismal inscription, and the symbol or mark which counsel for the City contends is a "C" designating "colored" is distinctly different from other purportedly similar "C's" on the same page, being much larger in different colored ink (being the same as the ink used in entering the record of the marriage of Evelyn and Peter Dupas in 1953) and in having a pronounced break in the "tail". It is the Court's conclusion after a close study of the original entry, much larger and clearer than the substituted photostats, that there is little resemblance between this symbol and the other "C's" on the same page. (See Exhibit City Cambon 2).

The City has, of course, established to the satisfaction of this Court that Peter Dupas, Sr., is one and the same person as the Pierre Theodore Duplessis whose baptism is inscribed in the records of St. Catherine's Church, New Orleans (City L). However, that original entry referred to above is of no value in determining the race of Peter Dupas inasmuch as there is no reference to race or place of birth. Incidentally, the City presented no record proof supporting the position that Peter Dupas, Sr., is colored, with the exception of the birth record of "Ralph Duplessis", son of Peter Duplessis and Evelyn Duples-

sis (City I), which record designates parents as colored; but, as previously stated, this record has been ruled inadmissible by this Court).

Sydney Duplessis, a colored man from Davant, Louisiana, testified that he knew Peter Dupas, Sr., as Peter Duplessis in Plaquemines Parish and he traced his own and Peter's lineage to a common, though distant, ancestor. This witness, however, could not name or identify the relations by blood or marriage of his or Peter's ancestors, and there is some question as to his veracity. But even if his testimony is accepted as true, it does not conclusively establish Peter Dupas, Sr., as colored inasmuch as Sydney's colored blood could have been interjected in his own paternal line after the common ancestor.

Several of the City's witnesses did none the less relate that Peter's father, Simon (or Seymour) was known as colored in Plaquemines Parish (H. Ansardi, V. 3, p. 112; Gravolet V. 3, p. 38; J. Ansardi, V. 6, p. 78).

City of New Orleans death registration, funeral records and a Times-Picayune death notice of one Edwin Duplessis, colored, show the deceased to be a brother of persons having names quite similar to brothers and sisters of Peter Dupas, Sr. However coincidental and significant this may be, these records are not without serious distinction in part, most significant of which is that Edwin's father is listed as Jules (City #34) and there is no sister of Edwin by the name of Thelma.

The evidence recited above is not exhaustive, but includes all of the evidentary matters considered by the Court to be significant.

After serious consideration of all of the evidence presented, this Court believes that the City of New Orleans has failed to establish beyond a reasonable doubt that Relator, a man who has been commonly accepted as caucasian, is in fact of colored ancestry in either his maternal or paternal lineage.

In view of this determination, and because of the earlier conclusion by this Court that Relator was born in the City of New Orleans, the exceptions to the jurisdiction rationae materiae and the of no right of action must be overruled.

Consistent with the stated reasons, the writ of mandamus sought by Relator will be made peremptory.

October 31, 1957

Motion for New Trial

Now into Court through undersigned counsel comes the City of New Orleans, et al, defendants in the above numbered and entitled cause, appearing herein through John F. Connolly, Assistant City Attorney, and respectfully represents:

1.

That the judgment rendered against defendants herein on the 31st day of October, 1957 is contrary to the law and the evidence in the following particulars:

A.

That the Court erred in excluding as inadmissible the birth certificate of one Ralph Duplessis (City #1), contended by defendants to be relator's birth certificate. Defendants show said certificate is an official document and record of the State of Louisiana, and existing at times unsuspicious; further that said document was initialed by the son of the registrat acting in his official capacity, designated to do so by the registrar under the powers vested in said registrar by Act 257 of 1918, which deputy's acts were further supervised, ratified and confirmed by the registrar.

B.

That relator failed to prove as required by law:

(1) That no birth certificate existed on him;
(2) That he was born in New Orleans;
(3) That his ancestors and he are of the white race.

C.

That the Court erred in requiring defendants "to establish beyond a reasonable doubt" that relator was white, an applicant for "delayed" birth certificate being required to prove and establish the race and identity of his ancestors and himself; the Court being in further error in emphasizing that relator has been accepted as white, rather than pursuing the race and acceptance of his parents, family and ancestors and requiring of relator the burden of proof in those particulars.

D.

That this Court of equity has failed to require relator "to do equity" and "to come in with clean hands". Relator has presented to this Court "altered" and misleading documents to obscure

the identity of his ancestry; which actions should reflect upon his case as a whole. Particularly, should it reflect further doubt upon the "foundling story" of Josephine St. Ann Duplessis.

E.

That the Court erred in evaluating the actions of Messrs. Lanauze and Prudhomme, former registrars of New Orleans; relator's mother having misrepresented to said officials the true paternal names and maternal names of her children, accepted by said officials under the name Dupas, said former officials having themselves established the "flag" on the name Duplessis as the basis for defendants' present position; no official of the City or State having ever accepted as white any of relator's family under the true name "Duplessis".

F.

That the Court erred in excusing the dark appearance of relator's father on the basis of a "Spanish appearance", relator having made no such suggestion. To the contrary, the neglect and resistance of relator in producing said father throughout the trial requires further implications and presumptions of the obvious reason therefor.

G.

That the Court erred in holding in contradiction that relator's father, Peter Dupas, Sr., is in fact Pierre Theodore Duplessis, yet referring to his children as "Dupas"; the Court permitting relator to capitalize on the fact that his grandparents erroneously voted and were buried under the assumed name "Dupas"; all of which is finding right out of wrong; that the Court has actually found that the name Dupas is assumed and fictitious and ignoring the unanimity of testimony and documentary evidence that the Duplessis of Plaquemines Parish are colored, both on the maternal and on the paternal side.

H.

That concerning the race of Peter Duplessis, Sr. (alias Dupas), father of relator, the Court erred in rejecting the testimony of various witnesses who identified him personally in Court as negro, who was raised in association with negroes, segregated from whites in the places where personally known and where personally identified.

I.

The Court further erred in finding that defendants "presented no record proof supporting that Peter Dupas, Sr. (Duplessis) is colored, with the exception of the birth record of Ralph Duplessis". (City #1). The Court overlooked documents City #2 and City #3, recorded at unsuspicious times, which are official public records and designate Peter Duplessis and Evelyn Duplessis, his wife, both as colored; the first born, Peter, Jr. (City #2), being registered colored, as was the still-born, being the same race as their said parents and being the same race as their brother, relator.

J.

On the exception of no right of action, in erroneously holding relator's birth certificate (City #1) inadmissible, the Court has further failed to note that the mid-wife, Mrs. Duplessis, swears that two children, Peter and Ralph, sons of Peter Duplessis and Evelyn Duplessis, were delivered by her in Plaquemines Parish, the Court further failing to note the positive testimony of neighbors as to their origin, attesting impartially to this fact.

K.

That the Court correctly found that relator's father is in fact "Peter Theodore Duplessis", but that the significance of the plan and plot under the name Dupas has escaped the Court, said plan and plot necessarily having a specific objective to pass as white, the Court failing to perceive the admissions which the plan and plot involved.

2.

Defendants are aggrieved by the said judgment and desire and are entitled to a new trial herein.

WHEREFORE, defendants pray that they be granted permission to file this application for a new trial, and that, after due proceedings had, the judgment rendered herein on the 31st day of October, 1957 be set aside and annulled, and a new trial granted in the premises.

JOHN F. CONNOLLY,
Assistant City Attorney

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Opinion on Motion for New Trial

All of the arguments made in the motion for new trial were presented at length when the case was argued after trial on the merits and were fully considered by me. I see no reason to

grant a new trial. The only serious question is the admissibility of the so-called birth record of Ralph Duplessis. This "registration" was not made by the registrar nor by anyone officially connected with the office of the Louisiana State Board of Health, and I am still of the view that it is not admissible as a public record which proves itself. However, even if it be considered admissible, it can be given little or no weight since the minor child who made this "registration" at the time, did not testify to its correctness although he was available. The midwife testified that she did not make the entry as to race or color, and the registrar herself did not register this birth.

Without proof of the truth of this entry by the person who made it, this Court can give little or no weight to the document as such.

The new trial is denied.

November 6th, 1957.

JUDGMENT

This cause having been heretofore tried, argued and submitted to the Court for adjudication, and for the reasons herein filed and made part of the record; IT IS ORDERED, ADJUDGED AND DECREED that all exceptions filed herein be overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the alternative writ of mandamus heretofore issued herein be now made peremptory, and accordingly that De Lesseps S. Morrison, Mayor of the City of New Orleans, and Dr. Boni J. Delaureal, Chairman and Registrar of Vital Statistics for the Board of Health for the City of New Orleans, be directed and commanded to accept the application for delayed birth certificate, to register same and to deliver a delayed certificate of birth unto Relator, Ralph Dupas, showing him to be a member of the white race, born on October 14, 1935, in the City of New Orleans, the issue of Peter Dupas, Sr., and Evelyn Foto.

JUDGMENT READ AND RENDERED IN OPEN COURT ON OCTOBER 31st, 1957.

JUDGMENT READ AND SIGNED IN OPEN COURT ON NOVEMBER 7, 1957.

LEGISLATURES

EDUCATION
Public Schools—Texas

A special session of the Texas legislature was called by the governor to meet in November, 1957. The call suggested the enactment of legislation to provide for the closing of public schools at which federal troops are stationed and to provide for legal defense of suits against schools. Legislation enacted by this session, together with the proclamation of the governor, are set out below. [See also the opinion of the Attorney General of Texas as to the constitutionality of similar legislation, *infra*, p. 123.]

The proclamation of the governor of Texas, issued November 11, 1957, calling the special session follows:

PROCLAMATION
by the
GOVERNOR OF THE STATE OF TEXAS

To All To Whom These Presents Shall Come:

I, Price Daniel, Governor of the State of Texas, do by virtue of authority vested in me by the Constitution of Texas, hereby call a special session, 55th Legislature, to be convened in the City of Austin, commencing at 10 a. m., Wednesday, the 13th day of November, A. D. 1957, for the following purpose:

To further provide for the maintenance of law, peace, and order in the operation of the public schools without the use of military forces: authorizing the school board having jurisdiction to close any school at which it finds that peace and order cannot be maintained without resort to military force or occupation, or at which federal troops are stationed for direction or control of the order, operation, or attendance at such school; providing that State aid, school accreditation, and payment of salaries to school officials teachers, and employees shall not be affected thereby; providing that transfer of pupils may be made by the local board, and that the school shall be reopened at the earliest possible time that peace and order can be maintained without the use or occupation of military forces; and authorizing the Attorney General to assist any public school board requesting such assistance, in the defense of any legal action in a federal court challenging the constitutionality of a statute of this State and authorizing the transfer of certain funds for such purpose.

The Secretary of State will take notice of this action and will notify the members of the Legislature.

Done at Austin, Texas, this eleventh day of November A.D., 1957, under the Seal of this State properly attested by the Secretary of State.

/s/ Price Daniel

ATTEST:
/s/ Zollie Steakley
Secretary of State

EDUCATION
Public Schools—Texas

Senate Bill No. 1 of the second 1957 special session of the Texas legislature, as enacted on December 10, 1957, provides for the closing of public schools by school boards "when violence or the danger thereof cannot be prevented except by resort to military occupation." Under the act schools are to remain closed "so long as troops remain."

An act relating to the maintenance of peace in the operation of public schools without resort to military occupation and control; authorizing the closing of such schools by the school board having jurisdiction when violence or the danger thereof cannot be prevented except by resort to military occupation; providing that upon certain findings of the school board, the Governor shall close schools and suspend their operation until the school board shall certify to the Governor that such closure is no longer necessary, whereupon the Governor by proclamation shall cancel the closure; providing in the event a school is closed under the provisions of Section 2½, Sections 4 and 5 shall apply; providing that the school remain closed so long as troops remain; providing that salaries, state aid and accreditation shall not be affected, authorizing transfer of pupils to other schools, suspending compulsory school laws, providing for out-of-class instruction during application of this Act; providing that the provisions of the Act shall be severable; and declaring an emergency.

Be It Enacted by the Legislature of the State of Texas:

Section 1. The purpose of this Act is to further provide for the maintenance of law, peace, and order in the operation of the public schools without resort to military occupation or control. The duties and powers vested in public officials and school boards under this Act shall be in addition to and cumulative of those with which they are vested under existing law for accomplishment of the purpose of this Act or any section thereof.

Sec. 2. The Governor, through the Department of Public Safety, shall provide assistance when called upon by local authorities to prevent violence and maintain peace and order in the operation of public schools; provided that the Texas National Guard and other military forces shall not be used for direction or control of the operation, or attendance at such schools. In any instance where the Governor by written proclamation, or the school board having jurisdiction finds that violence or the danger thereof cannot be prevented except by resort to military force or occupation of a public school, the school board may close the school and suspend its operation for such period as the board finds it necessary to maintain order and the public peace in accordance with the terms of this Act.

Sec. 2½. In any instance where the school board having jurisdiction finds that violence or the danger thereof cannot be prevented except by resort to military force or occupation of a public school, and certifies such fact to the Governor, it shall be the duty of the Governor to close such school and suspend its operation until such time as the aforesaid school board shall certify to the Governor that such closure is no longer necessary in the maintenance of order and public peace; and upon such certification that the closure is no longer necessary, the Governor must cancel and annul such closure, and issue a proclamation to that effect.

In the event a school is closed under the provisions of this section, then the provisions of Sections 4 and 5 of this Act shall apply.

The provisions of this section are in addition to and cumulative of other provisions of this Act.

Sec. 3. In the event the National Guard or any other military troops or personnel are employed or used upon order of any Federal authority on public school property or in the vicinity of any public school for direction or control of the order, operation, or attendance at such school, the school board having jurisdiction may close the school and suspend its operation so long as said troops remain on or within the vicinity of the school for any of such purposes.

Sec. 4. If any school is closed pursuant to Sections 2 and 3 hereof, the salaries of school officials, teachers, and employees shall not be affected, and they shall be assigned to such duties as may be determined by the school board having jurisdiction. Neither shall state aid as provided by law or school accreditation be affected. The school board may authorize and provide for the transfer of pupils to another school in the district upon petition of the parents or persons standing in loco parentis. Compulsory attendance laws shall not be applicable when pupils are unable to attend school because of the application of this Act.

Sec. 5. Upon closure of any school pursuant to Sections 2 and 3 hereof, the school board and the State Board of Education shall use all personnel, funds and facilities necessary to provide out-of-classroom instruction for the pupils concerned and for the reopening of such school at the earliest possible time that peace and order can be maintained without the use or occupation of military forces.

Sec. 6. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 7. The fact that public education under martial law or military occupation is incompatible and contrary to the concepts of freedom and democracy, and that it would be extremely detrimental to the well being and education of the school children of this state to be required to attend public school under the force and surveillance of military troops, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended; and said rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

/s/ Ben Ramsey
President of the Senate
/s/ Waggoner Carr
Speaker of the House

I hereby certify that S. B. No 1. passed the Senate on November 22, 1957, by a viva voce vote.

/s/ Charles Schnabel
Secretary of the Senate

I hereby certify that S. B. No. 1 passed the House on November 26, 1957, by the following vote: Yeas 115, Nays 26.

/s/ Dorothy Hallman
Chief Clerk of the House

Approved:
December 10, 1957
Date
/s/ Price Daniel
Governor

Filed in the office of the Secretary of State 11 o'clock Dec. 11, 1957
/s/ Zollie Steakley
Secretary of State

EDUCATION
Public Schools—Texas

Senate Bill No. 2 of the second 1957 special session of the Texas legislature, as enacted December 10, 1957, authorizes the state Attorney General to render legal assistance to school boards "in any lawsuit in Federal Court challenging constitutionality of a state statute."

An act authorizing the Attorney General, upon request, to assist any School Board in defense of any lawsuit in a Federal Court challenging constitutionality of a state statute and transferring funds for such purpose; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. In order to help prevent situations which might result in the occupation of public schools by military forces or the closure thereof, the Attorney General is authorized to assist any public school board which requests his assistance in the defense of any lawsuit in a Federal Court which seeks to challenge the constitutionality of a statute of this state; provided that this section shall not apply with respect to any controversy which may occur between a public school board and an agency of the state which, under existing law, the Attorney General is authorized or required to represent.

Sec. 2. The sum of Fifty Thousand ($50,000.00) Dollars out of the sum of Three Hundred Thousand ($300,000.00) Dollars appropriated to the Governor's office in Item 26 of the Appropriation to the Governor's Office in House Bill No. 133, Acts of the 55th Legislature,

Regular Session, 1957, Chapter 385, appropriated for the purpose, among other purposes, of defense of the sovereignty of the State of Texas against encroachment by the Federal Government or by other state governments, is hereby transferred to the Attorney General's appropriation, and may be expended by the Attorney General of Texas for the purposes of paying salaries, wages, travel expense, office equipment and supplies and other expenses necessary to carry out the provisions of this Act. The said sum of Fifty Thousand ($50,000.00) Dollars may be expended by the Attorney General of Texas for the purposes set out herein in addition to the purposes for which said monies may be expended under the provisions of Item 26 of the Appropriation to the Governor's Office contained in House Bill No. 133, Acts of the 55th Legislature, Regular Session, 1957, Chapter 385.

Sec. 3. The fact that public education under martial law or military occupation is incompatible and contrary to the concepts of freedom and democracy, and that it would be extremely detrimental to the well being and education of the school children of this state to be required to attend public school under the force and surveillance of military troops, and that assistance to local School Boards by the Attorney General in Federal Court would help prevent such military occupation, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended; and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

/s/ Ben Ramsey
President of the Senate
/s/ Waggoner Carr
Speaker of the House

I hereby certify that S. B. No. 2 passed the Senate on November 22, 1957 by a viva voce vote.

/s/ Charles Schnabel
Secretary of the Senate

I hereby certify that S. B. No. 2 passed the House on November 26, 1957, by the following vote: Yeas 120, Nays 20.

/s/ Dorothy Hallman
Chief Clerk of the House

Approved:
December 10, 1957
Date
/s/ Price Daniel
Governor

Filed in the office of the Secretary of State: 11 A.M. o'clock, Dec. 11, 1957
/s/ Zollie Steakley
Secretary of State

ORGANIZATIONS
Registration—Texas

House Bill No. 5 of the second 1957 special session of the Texas legislature, as enacted December 10, 1957, requires the registration of and filing of information by "any organization operating or functioning within any county . . . engaged in activities designed to hinder, harass, and interfere with the powers and duties of the State of Texas to control and operate its public schools."

An act to provide for the maintenance of law, peace and order in the operation of the public schools without the use of military forces by requiring certain organizations to file certain information under oath in the County Clerk's Office upon the request of the County Judge; providing a penalty for violations; declaring provisions of the Act severable; and declaring an emergency.

Be it Enacted by the Legislature of the State of Texas:

Section 1. It is hereby declared that the purpose of this Act is to provide for the maintenance of law, peace and order in the operation of the public schools without the use of military forces by requiring certain organizations engaged in activities designed to hinder, harass, and in-

terfere with the powers and duties of the State of Texas to control and operate its public schools, and which activities may result in serious disturbance of the public peace, to register and report certain information upon the request of the County Judge. The Legislature further declares that the disclosure of such information is essential to the health, safety and general welfare of the people of Texas.

Sec. 2. The term "organization" as used herein means any group of persons, whether incorporated or unincorporated, and includes any civic, fraternal, political, mutual benefit, legal, medical, trade or other kind of organization.

Sec. 3. Any organization operating or functioning within any county of this State engaged in activities designed to hinder, harass, and interfere with the powers and duties of the State of Texas to control and operate its public schools, upon the request of the County Judge of such County shall file with the County Clerk's Office the following information, subscribed under oath before a notary public, within seven (7) days after such request is made:

(*a*) The official name of the organiza- and list of members.

(*b*) The office, place of business, headquarters or usual meeting place of the organization.

(*c*) The officers, agents, servants, employees or representatives of the organization.

(*d*) The purpose or purposes of the organization.

(*e*) A statement disclosing whether the organization is subordinate to a parent organization, and if so, the name of the parent organization.

It shall be the duty of the person having custody or control of the records of the organization to furnish the information herein required.

Sec. 4. Information filed pursuant to Section 3 of this Act is hereby declared public and subject to the inspection of any interested party.

Sec. 5. Any person or organization who shall violate any of the provisions of this Act shall be deemd guilty of a misdemeanor and upon conviction thereof shall be fined not less than Fifty Dollars ($50) nor more than Two Hundred Dollars ($200) and each day of violation shall constitute a separate offense.

Sec. 6. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are declared to be severable.

Sec. 7. The fact that it is vital to the public interest and welfare that information to the extent herein provided be obtained with respect to organizations whose activities are causing or may cause interracial tension and unrest which would constitute a threat to the public peace creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

/s/ Ben Ramsey
President of the Senate
/s/ Waggoner Carr
Speaker of the House

I hereby certify that H. B. No. 5 was passed by the House on November 25, 1957, by the following vote: Yeas 76, Nays 52.

/s/ Dorothy Hallman
Chief Clerk of the House

I hereby certify that H. B. No. 5 was passed by the Senate on December 3, 1957, by the following vote: Yeas 13, Nays 12.

/s/ Charles Schnabel
Secretary of the Senate

Approved:
December 10, 1957
Date
/s/ Price Daniel
Governor

Filed in the office of the Secretary of State: 11:00 A. M. O'-Clock, Dec. 11, 1957
/s/ Zollie Steakley
Secretary of State

HOUSING
Private Housing—New York

An ordinance enacted by the city of New York on December 30, 1957, prohibits discrimination on the basis of race, color, religion, national origin or ancestry in the sale, rental or leasing of certain private housing accommodations. The housing affected is "multiple dwelling" housing. Enforcement of the ordinance is to be effected through the Commission on Intergroup Relations, a Fair Housing Practices Board and the courts.

A LOCAL LAW

To amend the Administrative Code of the City of New York in relation to discrimination and segregation in multiple dwellings.

Be it enacted by the Council of the City of New York as follows:

Section 1, Chapter 41 of the Administrative Code of the City of New York is hereby amended by adding thereto a new title to be Title X, to read as follows:

TITLE X

Discrimination and Segregation in Private Dwellings

§X41-1.0. Certain acts prohibited; penalties. a. In the City of New York, with its great cosmopolitan population consisting of large numbers of people of every race, color, religion, national origin and ancestry, many persons have been compelled to live in circumscribed sections under substandard, unhealthful, unsanitary and crowded living conditions because of discrimination and segregation in housing. These conditions have caused increased mortality, morbidity, delinquency, risk of fire, intergroup tension, loss of tax revenue and other evils. As a result, the peace, health, safety and general welfare of the entire city and all its inhabitants are threatened. Such segregation in housing also necessarily results in other forms of segregation and discrimination which are against the policy of the State of New York. It results in racial segregation in public schools and other public facilities, which is condemned by the constitutions of our state and nation. In order to guard against these evils, it is necessary to assure all inhabitants of the city equal opportunity to obtain living quarters, regardless of race, color, religion, national origin or ancestry.

It is hereby declared to be the policy of the city to assure equal opportunity to all residents to live in decent, sanitary and healthful living quarters, regardless of race, color, religion, national origin or ancestry, in order that the peace, health, safety and general welfare of all the inhabitants of the city may be protected and insured.

b. (1) Except as provided in Paragraph (2) of this subdivision, no owner, lessee, sublessee, assignee or managing agent of, or other person having the right to sell, rent or lease, a housing accommodation which is located in a multiple dwelling, as defined in Section 4 of the Multiple Dwelling Law, or which is offered for sale by a person who owns or otherwise controls the sale of ten or more one- and two-family houses located on land that is contiguous exclusive of public streets, or an agent of any of these, shall refuse to sell, rent, lease, or otherwise deny to or withhold from any person or group of persons such housing accommodations because of the race, color, religion, national origin or ancestry of such person or persons, or discriminate against or segregate any person because of his race, color, religion, national origin or ancestry in the terms, conditions or privileges of the sale, rental or lease or any such housing accommodations or in the furnishing of facilities or services in connection therewith.

(2) Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained. The provisions of this section shall not apply to any tenant of an apartment, as defined in Section 4 of the Multiple Dwelling Law, in which he or members of his family reside, who rents or leases a room or rooms in such apartment to another person or persons.

c. Any person claiming to be aggrieved by a violation of Subdivision b hereof may file with the Commission on Intergroup Relations a complaint in writing which shall state the name and address of the owner or other person alleged to have committed the violation complained of and shall set forth the particulars thereof and such other information as may be required by such commission. Upon the filing of such complaint, or upon its own motion whenever it has reason to believe that any owner or other person has violated Subdivision b hereof, such commission shall exercise its powers with a view to conciliating the matter and eliminating any discriminatory practice it finds to exist.

d. In case of failure of the Commission on Intergroup Relations to conciliate and eliminate a practice which it considers discrimination or segregation in violation of Subdivision b hereof, it shall refer the same to the Fair Housing Practices Panel hereinafter created, with its recommendation.

e. There is hereby created a Fair Housing Practices Panel to consist of twelve persons, who shall not be members of the Commission on Intergroup Relations, appointed by the Mayor and to serve at his pleasure. The members of the panel shall serve without compensation but shall be entitled to reimbursement of their necessary expenses. For each case that shall be referred to the panel pursuant to Subdivision b hereof, the Mayor shall designate any three members of the panel as a Fair Housing Practices Board which shall exercise the powers and duties provided for in Subdivision f hereof.

f. It shall be the duty of the Fair Housing Practices Board to review cases of alleged discrimination or segregation in violation of Subdivision b hereof, referred by the Commission on Intergroup Relations in accordance with Subdivision d hereof and to determine in each case whether in its judgment court action is warranted. The board shall have the power to hold hearings and to issue subpoenas. If it shall find in the affirmative, it may direct the Corporation Counsel to bring equitable proceedings in the Supreme Court, in the name of the city, for the enforcement of the provisions of this title.

g. Proceedings had [held] under this title, before the Commission on Intergroup Relations and before the Fair Housing Practices Board, shall be confidential.

§2. This local law shall take effect April 1, 1958.

CONSTITUTIONAL LAW
Amendments—Maryland (Proposed)

A proposed Joint Resolution (No. 28) requesting the United States Congress to submit for action by the states an amendment to the United States Constitution was passed by the Senate of the Maryland legislature at its 1957 session but failed of enactment in the state House of Representatives. The requested amendment would have permitted each state to determine for itself whether it would have segregated or integrated schools.

SENATE JOINT RESOLUTION
NO. 28

Senate Joint Resolution requesting the Congress of the United States to propose and send to the Legislatures of the several States, for ratification or rejection, a new Amendment to the Constitution of the United States which would permit each State to determine for itself whether it should have segregated or integrated schools and prohibiting any judicial construction of the Constitution to the contrary.

WHEREAS, the Tenth Amendment to the Constitution of the United States specifically reserves to the several States all powers not specifically granted to the Federal Government nor prohibited to the States by the Constitution, and

WHEREAS, it was not intended by the adop-

tion of the Fourteenth Amendment in 1866 to limit the power of the several States to regulate educational systems within their borders, and

WHEREAS, it was not the intention of the people of the United States nor of the Congress of the United States at the adoption of the Fourteenth Amendment to limit the power of the States to regulate and control educational systems, and

WHEREAS, it was neither the intention of the people of the United States nor of Congress at the time of passage of the Fourteenth Amendment that said amendment required integration of the white and negro races in public institutions of learning as evidenced by the fact that Congress of the United States, shortly after the passage of the Fourteenth Amendment enacted laws providing for segregated schools in the District of Columbia, and

WHEREAS, the 1954 decision of the Supreme Court of the United States requiring integration of the white and negro races in public institutions of learning contravenes all of the recognized concepts of States rights, and

WHEREAS, the said decision of the Supreme Court of the United States constitutes an unlawful usurpation of power and constitutes legislation in the field of education and States rights contrary to all recognized interpretations of the Constitution of the United States as handed down for nearly one hundred years, and

WHEREAS, a generally harmful condition will come forth from the integration of the white and negro races in public institutions of learning, and

WHEREAS, it is highly desireable to spell out in the Constitution in clear and unmistakable terms the interpretation of the Fourteenth Amendment which the people of the United States desire to have placed thereon, and

WHEREAS, it is further felt that the Supreme Court should not be permitted to further invade the rights of the States, especially in the field of education,

NOW THEREFORE BE IT RESOLVED, by the General Assembly of Maryland, that the Congress of the United States be earnestly requested to propose and send to the Legislatures of the several States, for ratification or rejection an Amendment to the Constitution of the United States, which would prohibit any Court from construing the Constitution so as to require integration of the white and negro races in public institutions of learning or other public places, and allowing each State to determine such matters for itself and for the purposes of suggesting the possible wording of such an Amendment, either one of the following drafts are recommended:

> "The Constitution of the United States and all Amendments thereto shall not be construed by any Court as requiring integration of the white and negro races in public institutions of learning or other public places; and each State shall, after the adoption of this amendment, determine by a vote of the qualified voters thereof, whether or not integration of the said races shall exist within its borders."

or

> "The Constitution of the United States and all Amendments thereto shall not be construed by any Court as requiring integration of the white and negro races in public institutions of learning or other public places; and each State shall determine whether or not integration of the said races shall exist within its borders."

AND BE IT FURTHER RESOLVED, that the Secretary of State be instructed to send copies of this Resolution under the Seal of the Great State of Maryland to the President of the United States Senate, to the Speaker of the House of Representatives, and to each member from Maryland in the Senate and House of Representatives and to the presiding officers of the Legislatures of the several States urging them to use their utmost endeavors to carry out our desires as expressed in this Resolution.

CONSTITUTIONAL LAW
Amendments—Texas

House Concurrent Resolution No. 32 of the second 1957 special session of the Texas Legislature memorializes Congress to set up certain requirements of judicial experience for prospective justices of the United States Supreme Court.

HOUSE CONCURRENT
RESOLUTION NO. 32

WHEREAS, the custom has developed of appointing persons distinguished in government administration or politics to the Supreme Court of the United States; and

WHEREAS, Such persons, while otherwise qualified, usually have little or no scholarly knowledge of the origin and development of our body of constitutional law and its present-day place in our American system of government; and

WHEREAS, Such persons also, as a rule, have little or no practical experience as participants in the involved processes pertaining to the administration of our system of jurisprudence; and

WHEREAS, The conspicuous lack of judicial experience so often found on our nation's highest tribunal has for some time caused great concern on the part of Congress, the American Bar, and all thinking citizens; and

WHEREAS, This situation has led to a general demand for the imposition of minimum requirements of judicial experience for all appointees to the Supreme Court of the United States; and

WHEREAS, The House of Delegates of the American Bar Association has recommended the establishment of experience qualifications for all persons eligible for appointment to the Supreme Court; and

WHEREAS, A number of Bills and Resolutions have been recently introduced in Congress which would require appointees to the Supreme Court to have had some previous judicial experience; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, that the Legislature of the State of Texas does most urgently request the Congress to enact by appropriate Legislation or other procedure, the requirement that any person, to be eligible for appointment as a Justice or Chief Justice of the Supreme Court of the United States, must have at least five (5) years experience in the private practice of law and five (5) years experience as a judge of a Federal or State court of record of original or appellate jurisdiction, or as a full-time teacher in an approved school of law; and, be it further

RESOLVED, That copies of this Resolution be sent to each member of the Texas delegation in Congress and that we hereby urgently request their full cooperation and support in this proposed legislation so vital and important to our American system of government.

/s/ *Ben Ramsey*
President of the Senate
/s/ *Waggoner Carr*
Speaker of the House

I hereby certify that H. C. R. No. 32 was adopted by the House on December 3, 1957.
/s/ *Dorothy Hallman*
Chief Clerk of the House

I hereby certify that H. C. R. No. 32 was adopted by the Senate on December 3, 1957.
/s/ *Charles Schnabel*
Secretary of the Senate

APPROVED: December 10, 1957
/s/ *Price Daniel*
Governor

Filed in the office of the Secretary of State 11:00 A.M. o'clock, Dec. 11, 1957
/s/ *Zollie Steakley*
Secretary of State

CONSTITUTIONAL LAW
Tenth Amendment—Texas

House Concurrent Resolution No. 5 of the second 1957 special session of the Texas Legislature proposes that a national convention be called, as provided by Article V of the United States Constitution, to amend the constitution so as "to clearly and specifically set out certain limits beyond which the United States government has no authority, as generally provided in the Tenth Amendment . . .", and urges the various states to suggest Congress restrict the delegates to such a convention to persons who do not hold public office.

HOUSE CONCURRENT
RESOLUTION NO. 5

WHEREAS, The Constitution of the United States is based upon the principle of proper limits being placed on the exercise of all power by all governments and officials, both state and national; and

WHEREAS, The people of the United States have historically believed in a written constitution rather than rule by proclamation; and

WHEREAS, The exercise of power by the United States Government has become so great and centralized as a result of the United States Supreme Court's liberal interpretation of the powers ascribed to the United States Government under the United States Constitution so as to threaten the very existence of all State Governments and states' rights except as political subdivisions of the United States; and

WHEREAS, The United States Supreme Court has virtually repealed the Tenth Amendment by interpretation which has resulted in a central government almost without limit of its powers; and

WHEREAS, The Legislature of the State of Texas feels that "all power corrupts, absolute power absolutely"; and

WHEREAS, The Texas Legislature further feels that individual rights and freedoms are best protected by limiting the powers of government rather than centralizing them; and

WHEREAS, The Legislature of the State of Texas recognizes that the easiest way for a foreign enemy to control the United States is to centralize all power and control in one central government rather than have all powers divided and limited among an "indivisible union of indestructible states"; and

WHEREAS, Article V. of the United States Constitution provides a method whereby two-thirds of the States' Legislatures can petition Congress for a National Convention to propose an amendment to the United States Constitution to clearly and specifically set out certain limits beyond which the United States Government has no authority, as generally provided in the Tenth Amendment; therefore, be it

RESOLVED, by the Texas House of Representatives, the Senate concurring, That a copy of this Resolution be sent to the President of the United States, Presiding Officers of the United States Senate and the House of Representatives, and the Governors and Presiding Officers of the Legislative bodies of each of the respective states; and be it

RESOLVED, That each state be requested to urge the Congress to provide that the delegates to any such convention be either elected or appointed from local or state officials, or individual citizens from each of the several states who hold no public office.

CONSTITUTIONAL LAW
Use of Troops—Texas

House Concurrent Resolution No. 3 of the second 1957 special session of the Texas Legislature, as signed by the governor December 2, 1957, questions the constitutional authority for the use of troops in the Arkansas integration situation, and urges the President to "desist and refrain from sending Federal troops into Texas and interfering with the constitutional right of the State of Texas to provide, operate and discipline the public schools of Texas."

HOUSE CONCURRENT
RESOLUTION NO. 3

WHEREAS, The people of the United States established a Constitution in which they reserved all powers not delegated to the United States by the Constitution, nor prohibited by it, to the States respectively, or to the people; and

WHEREAS, Far-reaching decisions by the United States Supreme Court are upsetting our long-established rights, fundamental principles and traditions; that since the Court's historic ruling on school segregation in 1954 reversing Court decisions of more than fifty years' standing, a Court majority, under Chief Justice Warren, has exceeded its powers and prerogatives by violating the basic rights of the States and the powers of Congress; and

WHEREAS, As a result of this total disregard on the part of the Supreme Court of all its previous decisions, as well as the Constitution of the United States—which places on the States the primary responsibility to preserve order and prevent violence within their borders—the President of the United States sent Federal troops into the State of Arkansas in a school segregation matter, and deprived this State of her constitutional rights with the use of Federal troops; and

WHEREAS, Federal troops and their uniformed commander, by authority of the Federal government, have entered a state school operated by state funds and under state laws, although Congress has passed no law forbidding segregation; and

WHEREAS, The Constitution of the United States of America provides, in Section 4 of Article IV, that the Federal Government shall protect the States against domestic violence on application of the Legislature, or of the Executive (when the Legislature cannot be convened); now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That, in order that there be no misunderstanding as to the desires of the Legislature of the State of Texas in regard to the military occupation of the public schools of this State, the President of the United States be advised that the Legislature of the State of Texas requests that he desist and refrain from sending Federal troops into Texas and interfering with the constitutional right of the State of Texas to provide, operate and discipline the public schools of Texas; and that the Sovereign State of Texas declares it to be her constitutional right to provide, control and preserve order and prevent violence within her borders; and, be it further

RESOLVED, That the Governor be requested to transmit a copy of the foregoing Resolution to the President of the United States, to the Governor and Legislature of each of the other States, to each of the Houses of Congress, to Texas Representatives and Senators in Congress, to the Supreme Court of the United States and to the Attorney General of the United States for their information.

/s/ *Ben Ramsey*
President of the Senate
/s/ *Waggoner Carr*
Speaker of the House

I hereby certify that H. C. R. No. 3 was adopted by the House on October 23, 1957, by the following vote: Yeas 112, Nays 24; and that the House concurred in Senate amendments to H. C. R. No. 3 on November 12, 1957, by the following vote: Yeas 101, Nays 20.

/s/ *Dorothy Hallman*
Chief Clerk of House

I hereby certify that H. C. R. No. 3 was adopted, as amended, by the Senate on November 11, 1957.

/s/ *Charles Schnabel*
Secretary of the Senate

APPROVED: December 2, 1957
/s/ *Price Daniel*
Governor

Filed in the office of the secretary of state, 10 P.M. o'clock, Dec. 2, 1957.

/s/ *Zollie Steakley*
Secretary of State

LITIGATION
Legislative Investigation—Virginia

A Joint Committee on Offenses Against the Administration of Justice of the General Assembly of Virginia (referred to as the Boatwright Committee) was authorized by Chapter 34 of the 1957 Virginia Acts (see 2 Race Rel. L. Rep. 1020). The Committee was directed to investigate the administration and enforcement of state laws relating to champerty, maintenance, barratry, running and capping, and other offenses relating to the promotion or support of litigation. The investigation by the Committee was concerned primarily with activities of the National Association for the Advancement of Colored People. The report of the Committee, dated November 13, 1957, was submitted to the governor and General Assembly. [See also the report of the "Thomson Committee" involving a similar Virginia investigation at 2 Race Rel. L. Rep. 1159.]

Report of the Committee on Offenses Against the Administration of Justice

Richmond, Virginia
November 13, 1957

TO: *Honorable Thos. B. Stanley, Governor of Virginia*

and

The General Assembly of Virginia

Preliminary Statement

For some years charges have been made before the General Assembly that some members of the Bar were engaged in the unlawful solicitation of business, that certain corporations were engaged in the unauthorized practice of law, and that arrangements had been made between certain members of the Bar and certain groups whereby litigation was instituted in violation of the canons of ethics and to the enrichment of the members of the Bar participating therein.

In the Special Session of the General Assembly in 1956, there were adopted a number of measures which were designed to define more explicitly the common law offenses of barratry and maintenance and to provide means whereby the commission of those offenses might be more effectively detected and punished. In order to ensure that persons requiring legal assistance, but unable to pay therefor, would still be able to obtain justice, exceptions were made in these statutes to exempt from their ban activities conducted by legal aid societies approved by the Virginia State Bar, that being an official agency of the Commonwealth and created by the Supreme Court of Appeals pursuant to Sec. 54-49 of the Code of Virginia.

It was realized by the General Assembly that experience under these statutes might dictate changes to take care of conditions which were not contemplated when the legislation was being formed, or when it was introduced and enacted. Accordingly, the General Assembly created a committee to consider the operation of these statutes and related offenses and to report back to the next regular session with recommendations for any amendatory legislation deemed advisable. The Act creating the committee follows:

* * *

[*This act, Chapter 34, 1956 Virginia Extra Session Acts, having been printed in full at 2 Race Rel. L. Rep. 1020, is omitted.*]

* * *

Pursuant to the terms of this Act, E. Almer Ames, Jr., Onancock, and Earl A. Fitzpatrick, Roanoke, were appointed from the Senate and John B. Boatwright, William F. Stone and J. J. Williams, Jr., were appointed from the House of Delegates, all to serve on the Committee.

The Committee met and organized on November 26, 1956, electing John B. Boatwright, Chairman, and Earl A. Fitzpatrick, Vice-Chairman. John B. Boatwright, Jr. was designated Secretary, and both he and Harold V. Kelly, of the staff of the Division of Statutory Research and Drafting were named both as clerks and as assistant counsel to the Committee.

William H. King, Esquire, of the Richmond

City Bar was engaged by the Committee to serve as its counsel.

As will be noted from the Act, the Committee was directed to investigate and determine the extent and manner in which the laws of the Commonwealth relating to the administration of justice are being administered and enforced, and was to specifically direct its attention to the administration and enforcement of those laws relating to champerty, maintenance, barratry, running and capping and other offenses of any other nature relating to promotion or support of litigation by persons who are not parties thereto. These offenses are briefly defined in *"Appendix I"*.

Procedures Employed By The Committee

In an effort to determine whether various persons and organizations were engaging in activities subject to its jurisdiction, the Committee by written communications dated January 14, 1957, requested certain information from the Defenders of State Sovereignty and Individual Liberties, the National Association for Advancement of Colored People, Incorporated, the Virginia State Conference of NAACP Branches and the NAACP Legal Defense and Educational Fund, Incorporated (hereinafter respectively referred to as Defenders, NAACP, Virginia State Conference, and Defense Fund). The Defenders complied fully with the Committee's request, supplying all the information sought. The Defense Fund complied with the request in major part. However, the NAACP and the Virginia State Conference refused to supply the material requested.

Thereupon, pursuant to the motion of the Committee, the Hustings Court of the City of Richmond on February 14, 1957 issued subpoenas directed to the NAACP, the Defense Fund and the Virginia State Conference, requiring each of them to produce before the Committee information designated by the subpoenas. The NAACP and the Defense Fund substantially complied with the subpoenas served on them. However, the Virginia State Conference refused so to comply, and on February 18th filed in the United States District Court for the Eastern District of Virginia, at Richmond, a motion and a complaint seeking that the Committee be enjoined from investigating the Conference. On March 1, 1957, the Committee filed in the District Court its motion that such proceedings be dismissed.

On March 8, 1957, the Committee sought a further subpoena from the Hustings Court of the City of Richmond and directed to the Virginia State Conference. This subpoena was issued on the same day. In this instance also, the Virginia State Conference declined to comply with the subpoena and on March 11th filed with the Hustings Court a motion that both the subpoena on February 14th and the subpoena of March 8th be quashed.

[*Subpoenas Issued*]

On March 11, 1957, pursuant to the Committee's motion, the Hustings Court of the City of Richmond issued subpoenas directed to the Defenders, the NAACP and the Defense Fund. On the same day, and at the instance of the Committee, comparable subpoenas were issued out of the Corporation Court of the City of Charlottesville to the Virginia White Citizens' Council, out of the Circuit Court of Fairfax County to the Fairfax Civic Council, and out of the Corporation Court of the City of Newport News to the Virginia League and the Peninsula Citizens' Council. These subpoenas were fully complied with by the Defenders, the Defense Fund, the Virginia White Citizens' Council, the Fairfax Civic Council, the Virginia League and the Peninsula Citizens' Council; and were for the most part complied with by the NAACP.

As a result of this response it was found that the Virginia White Citizens' Council, the Defenders, the Fairfax Civic Council, the Virginia League and the Peninsula Citizens' Council had not, directly or indirectly, committed the offenses of champerty, maintenance, barratry, running and capping or the unauthorized practice of law.

On March 18, 1957 the Hustings Court of the City of Richmond, after testimony and arguments, denied the motion made by Virginia State Conference that the subpoenas of February 14th and March 8th be quashed. Thereafter, Virginia State Conference took an appeal from this order to the Supreme Court of Appeals, which appeal is presently pending.

In view of this, on March 19, 1957, subpoenas were issued against fourteen individuals who had been found to be either officers of, or lawyers retained by, the NAACP and its affiliated organizations, requiring them to appear before the

Committee in the City of Richmond for examination. Such examinations were thereafter held in closed session, each witness being represented at the hearing by from one to six counsel.

On April 12, 1957, after lengthy arguments, a three-judge court sitting as the United States District Court for the Eastern District of Virginia denied the request of the Virginia State Conference that there be enjoined the proceedings of the Committee against it.

[*Meets in Charlottesville*]

On May 15, 1957, after service of subpoenas issued out of the Corporation Court of the City of Charlottesville, the Committee met in that city and examined further witnesses connected with the Charlottesville Branch of the NAACP and parties in the Charlottesville school case.

On June 20, September 13, and October 28 and 29, 1957, the Committee examined numerous witnesses in closed session in the City of Richmond.

In June of 1957, the Committee caused subpoenas to be issued out of the Circuit Court of Prince Edward County against the Prince Edward Branch of the NAACP; out of the Circuit Court of the City of Richmond against the Richmond Branch of the NAACP and out of the Circuit Court of the City of Norfolk against the Norfolk Branch of the NAACP. In each instance, the Branch affected filed motions that the subpoenas addressed to it be quashed. On July 5, 1957, after the hearing of evidence and extended arguments, the Circuit Court of Prince Edward County denied the motion to quash made by the Prince Edward Branch and required its compliance. Because of this, both the Richmond and Norfolk Branches of the NAACP withdrew their motion to quash the subpoenas issued against them and complied with their terms.

It thus appears that, solely because of the NAACP and its affiliated persons and organizations wishing to withhold information from the Committee, the Committee has been required to obtain the assistance of various courts of the Commonwealth not less than fourteen times during a period of ten months. It should be added that no other persons or organizations investigated by the Committee has undertaken to hinder its efforts in any manner. A listing of the times and nature of these various court appearances is to be found in "*Appendix 2*".

In addition to the information obtained by the Committee by means of subpoenas requiring the production of documents and the testimony of witnesses, it has also received information as a result of investigations made on its behalf by retained investigators formerly associated with the Federal Bureau of Investigation, as a result of testimony of various NAACP personnel and other witnesses before the United States District Court for the Eastern District of Virginia in the case of NAACP, et al. v. Almond, et al., and as a result of information received from the investigation made by the Committee on Law Reform and Racial Activities.

Because of the responses to the several subpoenas and additional facts acquired by the Committee, it has become apparent that the NAACP, the Defense Fund, the Virginia State Conference and several of the local NAACP Branches have been guilty of barratry and related offenses. It further appears that the methods of operation of these organizations is such that commission of these offenses may well continue unless preventive measures are taken.

Findings of Fact

The NAACP is a New York membership corporation (see "*Appendix 3*") which has operated in Virginia for many years. Its headquarters are located in New York, N. Y., although it also has large offices in Dallas, Texas, and in San Francisco, California. This corporation controls an unincorporated organization covering Virginia generally, which organization is known as the Virginia State Conference of NAACP Branches. This Conference serves as the intermediary between local Virginia Branches of the NAACP and the national organization. (See "*Appendix 4*".) The numerous local Branches consist of the membership of the NAACP in the various localities of the State. All these Branches are chartered by the National Office in New York. (See "*Appendix 5*".)

The NAACP carried on its activities as one corporate entity until 1942, at which time the NAACP Legal Defense and Educational Fund, Incorporated was organized under the laws of the State of New York. (See "*Appendix 6*".) The NAACP and the Defense Fund work so closely together that it is difficult to distinguish the activities of one from the other. Donations to the Defense Fund are deductible on the federal income tax return of the donor.

To show better the relationship between the

NAACP, the Defense Fund, the Virginia State Conference, and the local Branches they are separately considered under the following subheadings.

NAACP

The principal objectives of the NAACP, as set forth in its articles of incorporation, are:

> ". . . . voluntarily to promote the equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law."

And, as set forth in its complaint filed in the United States District Court for the Eastern District of Virginia on February 18, 1957, it seeks to accomplish these objectives in the following manner:

> *"Plaintiff corporation, its Virginia State Conference, its Branches and members have worked jointly and severally* to secure for American Negroes those rights guaranteed them by the Constitution and laws of the United States. *This effort has been pursued in various ways:*
>
> (a) by apprising the public of the adverse effects of discrimination;
> (b) by seeking to secure the passage of federal and local legislation barring racial discrimination in various facets of American life and by seeking these results through executive action wherever possible;
> (c) *by encouraging Negro citizens to assert their constitutional rights and seek redress in the courts wherever necessary;*
> (d) by advocating the removal of all racial barriers to the full participation in community life of Negro citizens;
> (e) *by contributing to the payment of fees or expenses incident to the prosecution of litigation involving the constitutionality of racially discriminatory governmental action, and*
> (f) *by aiding in defraying expenses of such litigation from funds raised by public solicitation."*
>
> *"Plaintiff corporation, its Virginia State Conference of Branches, and its Branches and their members,* in their effort to secure equal rights and equal justice for colored citizens, *seek to persuade Negro citizens to exercise and assert their constitutional rights, included in which is the right to seek redress in the courts."* (Emphasis supplied)

The Defense Fund

As stated earlier, the activities of the Defense Fund and the NAACP were once merged in a single corporation. In order to gain tax exemption for the activities which are carried on by the Fund—providing legal services at no cost to plaintiffs in suits in which the Fund is not a party and has no direct interest—a separate corporation was established entitled the NAACP Legal Defense and Educational Fund, Incorporated. It is in intimate association with the NAACP, has comparable objectives, aids the NAACP in promoting litigation in which the Defense Fund will furnish counsel, and is generally the federally tax exempt counterpart of the NAACP. In order to avoid the barratry statutes of New York, it qualified there as a legal aid society. It has not attempted so to qualify in Virginia.

The Virginia State Conference

The Virginia State Conference has adopted and fosters the purposes of the NAACP. The Virginia State Conference serves as a coordinator of the activities of the various branches throughout the State.

In order to carry out its aims and objectives the NAACP has formulated a concrete and highly effective program. They maintain a national legal department in the New York offices. Likewise the Virginia State Conference and Branches have legal staffs. It is the primary duty of the legal staff of the Conference to prepare and conduct its legal program and that of the Branches; to represent the Virginia State Conference or Branch in any litigation which they sponsor; and to supervise and conduct the legal program of the Branches and other units in consultation with the NAACP legal department. This is evidenced by Sec. 2, Article IV, of

the Constitution of Virginia State Conference of NAACP Branches where it is said:

> "It shall be the duty of the legal staff to prepare and conduct the legal program of the State Conference; render legal opinions when requested by the Conference or any Branch; *represent the Conference in any litigation wherein the Conference is a party; supervise and conduct the legal program of the branches and other units in consultation with the National Legal Department;* and perform such other functions as may be assigned or delegated to it by the State Conference or Board of Directors." (emphasis supplied).

In Virginia the members of the Virginia State Conference legal staff have been primarily charged with carrying on the school integration litigation in cases furnished by the various local branches of the NAACP. It might be noted, at this point, that in every case involving school integration, the attorneys of record for the plaintiff have all been members of the legal staff of the Virginia State Conference.

The Branches

As we have noted, the Virginia State Conference is composed of approximately 90 Branches throughout the State. These Branches support the national organization financially and carry out the program and mandates of the NAACP at the local level. The Branches are the constituent and subordinate units of the NAACP, subject to the general authority and jurisdiction of the Board of Directors of the NAACP.

The executive secretary of the NAACP has described the relation of the Branches to the national office by stating that the NAACP exercises "such *minimal control* over the Branches as is set forth in the Constitution and By-laws for Branches." The following provisions of the Constitution and By-laws of the Branches contradict that statement:

Article I—Sec. 2—The Branch is subject to the general authority and jurisdiction of the directors of the NAACP, and adopts the purposes of that organization.

Article II—Sec. 4—The secretary of the Branch must report all events affecting the interests of colored people to the NAACP.

Article IV—Sec. 7—NAACP has the power to intervene in all election controversies.

Article IX—Sec. 1—The board of directors of the NAACP may declare all offices of the Branch vacant, should a Branch fail to report to the NAACP for a period of four months.

Article IX—Sec. 2—The NAACP may remove local officers for gross neglect of duty or conduct contrary to the best interest of the NAACP.

Article X—The NAACP may suspend or revoke the charter of a local Branch whenever the board deems it for the best interest of the NAACP.

Article XI—The Branches may adopt new by-laws or amend existing by-laws only with the prior written approval of the NAACP.

Thus, the Constitution and By-laws for Branches clearly point out that supervision over the operation and control of the Branches rests only in the board of directors of the New York corporation. The power to control and not its exercise is the determining factor. Further, when process has issued against a Branch the NAACP has invariably intervened.

Practices of the NAACP and its Affiliates

In order to recite with greater clarity the factual findings of the Committee insofar as they pertain to the practices of the NAACP and its affiliated organizations, under this heading of the Report we will state those findings in general chronological order.

(A) The Creation of the Plan to Govern Future School Cases.

Prior to 1950, the NAACP and its affiliated organizations had generally followed the scheme whereby their efforts in school matters were devoted to obtaining for Negro pupils "separate but equal" educational facilities.

However, in 1950 a plan was formulated by the NAACP to bring about the complete integration of the races in all educational facilities. The binding character of this plan is shown by a letter written by Spottswood W. Robinson, III, a member of the legal staff of Virginia State Conference to Rev. H. W. McNair of Amelia County in 1952 ("*Appendix 7*"). In that letter the following language appears:

> "Upon our conference you advised that the effort of your group is to obtain consolidation of Negro elementary schools in said

county, and that the effort is limited to this objective.

"As you were then advised, it is not possible either for this office or the NAACP to lend assistance in connection with this effort. In June, 1950, the Association adopted a policy requiring that all education cases seek facilities and opportunities on a racially non-segregated basis. *This policy is binding upon all Association attorneys,* and it is apparent that the plans of your group do not conform to this policy." (emphasis supplied).

The resolution referred to was adopted at a meeting of the Board of Directors of the NAACP on October 9, 1950 ("*Appendix 8*") and is as follows:

> "Plaintiffs in all educational cases—the prayer in the pleading and proof be aimed at obtaining education on a non-segregated basis and that no relief other than that will be acceptable as such.
>
> "Further, that *all lawyers operating under such rule will urge their client and the branches of the Association involved to insist on this final relief.*" (emphasis supplied).

(B) The Prince Edward County School Case.

Shortly after the adoption of this resolution, a petition was filed with the School Board of Prince Edward County concerning school conditions for Negro children in that county. Following the filing of this petition, a suit sponsored by the NAACP was instituted in May of 1951 against the Prince Edward School Board.

On May 17, 1954, the United States Supreme Court decided the Prince Edward School Case and three other allied cases from Kansas, South Carolina and Delaware, reversing the decision of a three judge District Court in Virginia upholding school segregation on the authority of Plessy v. Ferguson. 163 U.S. 537, 41 L.Ed. 256.

Testimony before this Committee, before the Committee on Law Reform and Racial Activities, as well as statements obtained from the plaintiffs by Committee investigators show: (a) that the plaintiffs in the Prince Edward School case were not advised of the fact that they were plaintiffs in a law suit; (b) in practically all instances they testified that they had not authorized any attorney to bring suit on their behalf for any purpose; (c) there had been no communication between the attorneys handling the case and the plaintiffs advising the latter of the nature or status of the litigation; (d) the entire law suit was prompted, directed and conducted at all stages by the NAACP, the Virginia State Conference and its attorneys; and (e) all expenses and fees incident to this litigation were paid by these organizations and handled by counsel who were all members of the legal staff of the NAACP or one of its affiliated organizations. No plaintiff involved in the case has made any payment of legal fees, expenses or costs, nor has any plaintiff been requested to do so.

Counsel of record for the plaintiffs in the Prince Edward School Case were Oliver W. Hill, Spottswood W. Robinson, III, Martin A. Martin, Robert L. Carter, and Thurgood Marshall. Hill was Chairman of the Legal Staff of the Virginia State Conference. Robinson was a member of the Legal Staff and was Southeast Regional Counsel for the Defense Fund. Martin A. Martin was a member of the Legal Staff of the Virginia State Conference. Robert L. Carter was Assistant Special Counsel for the NAACP. Thurgood Marshall was Special Counsel for the NAACP.

(C) "The Atlanta Declaration".

Less than a week after the decision of the Supreme Court of the United States in the Prince Edward school case, i. e. on May 22nd and 23rd, 1954, representatives of the NAACP from seventeen southern and border states and the District of Columbia, met in Atlanta, Georgia, to determine their future line of attack in school cases. The result of this meeting was the adoption of "The Atlanta Declaration", a copy of which is to be found as "*Appendix 9*". We here quote a portion of that document:

> "We are instructing all of our branches in every affected area to petition their local school boards to abolish segregation without delay and to assist these agencies in working out ways and means of implementing the court's ruling. The total resources of the NAACP will be made available to facilitate this great project of ending the artificial separation of America's children on the irrelevant basis of race and color."

The performance of this basic plan was promptly and vigorously undertaken by the Virginia State Conference.

Thus, on May 26, 1954, W. Lester Banks, the Executive Secretary of the Conference, sent an "Action Letter" to the officers of each of the approximately ninety NAACP Branches in the State of Virginia by which he called a "Statewide Emergency Meeting" to be held in Richmond on June 6th, which meeting was to be held "to develop techniques to put into immediate effect the NAACP's Atlanta Declaration". This "Action Letter" concluded, as follows:

> "It is of utmost importance that your branch retain the leadership in all actions engaged in your community. No conferences, petitions or other negotiations should be engaged in by NAACP or other responsible leaders with local school officials until after the June sixth meeting."

A copy of this Bank's communication of May 26, 1954, is filed herewith as "*Appendix 10*".

The meeting scheduled for June 6, 1954, was held in the City of Richmond and was attended by over three hundred delegates from Virginia Branches of the NAACP. As shown by a letter mailed to all Virginia Branch Officers by W. Lester Banks on June 16, 1954 ("*Appendix 11*") the following decision was reached at the June 6th meeting:

> "In order that the Virginia program might proceed with maximum uniformity and efficiency, *it was decided at this meeting that all desegregation activities in Virginia would be handled by joint action of the Virginia State Conference and the Branch in the particular area. Further, that action would not commence in any area until the specific details have been worked out, and the joint program has been fully organized and all branches have been informed thereof.* This joint program is designed to make the best use of our manpower with a view to effectively servicing all local communities as rapidly as possible." (Emphasis supplied)

This letter further recited that lawyers comprising the legal staffs of the NAACP and of the Virginia State Conference had prepared for use in sponsoring litigation necessary to give effect to "The Atlanta Declaration", a uniform type of petition, and accompanying instructions for its use. The letter, after stating that these petitions and instructions had been inadvertently sent to local Branches rather than to the Virginia State Conference, then stated:

> "Use of this petition or procedures in accordance with such instructions prior to completion of organization of the Conference programs, may promote confusion and diversity of activities in local communities. The Conference is proceeding with the development of its plan and will advise you thereof as soon as this work is completed. *"The purpose of this letter is to request that your Branch temporarily refrain from any proceedings or activities respecting desegregation of the schools in your community until further communication from the Conference has been received."* (Emphasis Supplied)

In or about the month of June 1955, the Virginia State Conference had completed the "development of its plan" by preparing a new set of instructions to be observed by local Branches in implementing integration in the schools. This plan, which was approved by the New York office of the NAACP, was in the form of a new set of instructions and is filed herewith as "*Appendix 12*". It is to be noted that this set of instructions was accompanied by a standard petition, and that the instructions directed the Branch officials to place these petitions in the hands of highly trusted and responsible persons to secure signatures of parents or guardians. It advised that signatures should be secured from parents in all sections of the county or city and that special attention should be given to persons living in "mixed neighborhoods" or near "formerly white schools." The Branches were particularly advised that the signing of the petition by a parent or guardian might well be only the first step in an extended court fight. They were therefore instructed that discretion and care should be exercised to secure petitioners who will "if need be—go all the way." The completed petitions were to be returned to Banks as the Executive Secretary of the Conference, whereupon a meeting place would be arranged at which those in attendance would be advised of their next move.

(D) Arlington, Charlottesville, Newport News and Norfolk School Cases.

The procedure required by the plan just mentioned was strictly adhered to in the commencement of the litigation involving the Arlington, Charlottesville, Newport News and Norfolk school cases. In each instance appropriate

Branch meetings were held prior to the filing of petitions with the local school boards, and at each meeting members of the Legal Staff of the Virginia State Conference were present to direct the accomplishment of the plan.

In each of these localities petitions prepared by the Legal Staff and substantially similar in terms were then filed with the local school boards; and in each instance the requests made by the petitions were denied.

In an effort to make it appear that members of the Legal Staff were selected by prospective plaintiffs as their counsel, in each of the four cases identical forms of "authorization" prepared by the Legal Staff of the Virginia State Conference were required to be signed by the intended plaintiffs without any explanation to them of the nature of the documents signed. In all instances, the counsel designated was not the result of selections made by the clients, but was a member of the Legal Staff who had been designated as counsel by the Virginia State Conference.

Thereafter, by the use of a standard form of complaint, law suits were commenced (i) against the school board of Newport News on April 26, 1956, (ii) against the school board of Charlottesville on May 9, 1956, (iii) against the school board of the City of Norfolk on May 11, 1956, and (iv) against the school board of Arlington county on May 17, 1956.

As has been indicated, these complaints were identical in their provisions. They were prepared initially by the Legal Staff of the Virginia State Conference and were thereafter finally revised by the legal department of the NAACP in New York City.

[*Cases Pending*]

As is known, in each of these cases the Federal District Court before whom the action was brought ordered that the school involved be promptly integrated. The cases in which these orders were entered are still pending.

Testimony before this Committee, before the Committee on Law Reform and Racial Activities, as well as statements obtained from the plaintiffs by Committee investigators show: (a) that many of the plaintiffs in each case were not advised of the fact that they were to be plaintiffs in a law suit; (b) the majority of plaintiffs testified that they had not authorized any attorney to bring suit on their behalf for any purpose; (c) except in isolated instances there had been no communication between the attorneys handling the case and the plaintiffs advising the latter of the nature or status of the litigation; (d) each law suit was entirely prompted, directed and conducted at all its stages by the NAACP, the Defense Fund, the Virginia State Conference and its attorneys; (e) with the exception of one payment of $10, all expenses and fees incident to this litigation were paid by these organizations and handled by counsel who were all members of the legal staff of the NAACP or one of its affiliated organizations; and (f) a large number of the plaintiffs in these cases were persons of substantial economic means not justifying litigation solely at the expense of others.

With the minor exception mentioned, no plaintiff involved in any of these cases has made any payment of legal fees, expenses or costs, nor has any plaintiff been requested to do so. The NAACP and its affiliated organizations, in financing this litigation, has done so without regard to the ability of any plaintiff to contribute to the fees or expenses involved.

Oliver W. Hill and Spottswood W. Robinson, III, were counsel of record for the plaintiffs in each of these four school cases. Hill was Chairman of the Legal Staff of the Virginia State Conference, and Robinson was a member of that Legal Staff and was also Southeast Regional Counsel for the Defense Fund. Edwin C. Brown, a member of the Legal Staff of the Virginia State Conference was also counsel of record in the Arlington school case. Samuel W. Tucker, Roland D. Ealey and Martin A. Martin, each being members of the Legal Staff of Virginia State Conference, were also counsel of Record in the Charlottesville school case. W. Hale Thompson and Phillip S. Walker, both members of the Legal Staff of the Virginia State Conference, were likewise counsel of record for the plaintiffs in the Newport News case. Victor J. Ashe and J. Hugo Madison, members of the Legal Staff of the Virginia State Conference, were also counsel of record for the plaintiffs in the Norfolk school case.

Accordingly, in none of these four cases were counsel for the plaintiffs other than members of the Legal Staff of the Virginia State Conference, Spottswood W. Robinson, III, being also Regional Counsel for the Defense Fund.

(E) Conduct of Individuals.

Several of the witnesses who testified before

the Committee conceded that they had themselves persuaded others not represented by them to commence litigation.

Thus Oliver W. Hill, who is Chairman of the Legal Staff of the Virginia State Conference testified before the Committee as follows:

> **Q** "* * * I am merely inquiring in what instance, as best you can now recall, has either the NAACP State Conference or any of its Branches or its officers, acting in the capacity of officers, undertaken to either encourage such litigation or to persuade the commencement of such litigation?
>
> **A** "It would be kind of hard to single out a single instance. *I say that has happened on numerous occasions.*
>
> **Q** "Can you recite what those occasions were?
>
> **A** "All right. A typical illustration would be this: last year in October in Petersburg at the annual conference, the principal speaker at the closing public meeting—
>
> **Q** "Annual conference of what?
>
> **A** "Annual meeting of the State Conference. The principal speaker was Dr. Mordecai Johnson, President of Howard University. *The whole tenor of his speech was to point out to Negroes why they should aggressively seek their constitutional rights. That was a meeting sponsored by the Conference. That is the type of thing that happens.*
>
> Now, as I say, to point them out I would have to say most any meeting where issues of that type were discussed and it is awfully hard to hold a meeting where you are going to discuss anything meaningful to Negroes that you don't discuss things of that nature.
>
> **Q** "Namely, things involving either encouragement or persuasion?
>
> **A** "That's right.
>
> **Q** "*Have you as an individual ever so addressed any gathering or any other person or group?*
>
> **A** "*Oh, yes.*
>
> **Q** "*Can you tell us when that occurred?*
>
> **A** "That would be most any time I have made a public *speech, and they have been numerous.*" (Emphasis supplied).

Spottswood W. Robinson, III, a member of the Legal Staff of the Virginia State Conference and Southeast Regional Counsel for the Defense Fund testified before the Committee on October 23 and 29, 1957. While testifying, there was read to him that portion of the complaint filed in the United States District Court for the Eastern District of Virginia on February 18, 1957, which portion is recited at pages 6 and 7 of this Report. Mr. Robinson was then asked whether he considered these allegations of the complaint to be true. He replied that he did. Thereupon Mr. Robinson was asked whether he had sought to persuade groups, by which he had not been retained as counsel, to commence litigation. After several intervening questions and answers Mr. Robinson replied:

> "There have been occasions when addressing a group, in discussing a matter perhaps with a friend or someone who happened to be talking to me about something—I am trying to cover the range of nonprofessional activities—in those situations there have been occasions when I have encouraged people, where they thought they were being denied their civil rights, to go about it in the American way and litigate their rights."

W. Lester Banks, who is Executive Secretary of the Virginia State Conference, first testified before the Committee on June 21, 1957. During the course of his testimony, it was pointed out to him that he had sworn to the truth of the motion to quash a subpoena issued against him out of the Circuit Court of the City of Richmond, June 14, 1957, and that such motion had recited that the NAACP, the Virginia State Conference, its Branches and members had undertaken to "encourage Negro citizens to assert their constitutional rights and seek redress in the courts wherever necessary." After prolonged examination on this point, the following testimony was elicited from Banks:

> **Q** "Someone has to say to the Negro citizen, 'You should seek redress in the courts' according to your allegation. Who is it that makes that statement to the Negro citizen? Quite obviously the association cannot do it. It is not a speaking person. Someone has to say something. Who is it?
>
> **A** "Maybe I am not understanding you correctly and maybe the explanation I am giving is not being understood.

Q "I am sure the latter is true.
A "I still think the answer I gave you is the only answer I can give you.

Q "Who, on behalf of the association, speaks for it to the Negro citizen to encourage him to 'Seek redress in the courts'?
A *"To answer that, most of the officers and most of the membership and certainly I, as Executive Secretary, fall in that category, as speaking for the association in Virginia."* (Emphasis supplied).

Samuel W. Tucker, a member of the Legal Staff of the Virginia State Conference testified before the Committee on March 29, 1957. In his testimony he freely conceded that he could recall no matters having been assigned him for handling by the NAACP or any of its affiliated organizations prior to his becoming a member of the Legal Staff. However, he further stated that after becoming a member of the Legal Staff he had, at the direction of the Conference or at the direction of Oliver W. Hill as Chairman of its Legal Staff, or at the request of a local Branch of the NAACP, represented Negro parties in not less than ten cases involving litigation.

In none of these cases had Tucker known or met the parties before seeing them at the direction of the Conference, Hill or a Branch. With one minor exception, his compensation had been entirely paid by a local Branch of the NAACP or by the Virginia State Conference. It is important to observe that Mr. Tucker then testified as follows:

Q "Are you the only lawyer that the Branches or the Conference calls on to do such things?
A "No indeed, by no means."

It is to be recalled that Oliver W. Hill, Spottswood W. Robinson, III, Martin A. Martin, Samuel W. Tucker, Victor J. Ashe, J. Hugo Madison, W. Hale Thompson, Edwin C. Brown, Phillips S. Walker, and Roland D. Ealey are members of the Legal Staff of the Virginia State Conference of the NAACP Branches. Each of these Staff members has appeared as counsel of record in one or more of the five school cases to which reference has been made. The only additional counsel of record in any of these cases have been Thurgood Marshall, who is Director and Counsel of the Defense Fund, and Robert L. Carter, who is General Counsel for the NAACP. In no case were lawyers unassociated with such organizations retained as counsel.

In each of these five cases the object of the litigation to seek integrated schools was determined entirely by the resolution of the Board of Directors of the NAACP adopted in New York City on October 9, 1950. In no case was the object of litigation specified by the selected "clients" who became plaintiffs in the cases.

In the great majority of instances the plaintiffs did not desire or realize they were to be made parties to litigation, and learned nothing of it until after such litigation was commenced; and at no stage did the lawyers involved discuss with the plaintiffs their wishes as to steps to be taken, all such matters being determined and directed by the NAACP organization sponsoring the litigation.

Furthermore, and with minor exceptions, in each of these cases those who were named as plaintiffs became represented by lawyers selected for them by the Virginia State Conference or a local Branch. The parties were not consulted as to who their counsel would be, and many were never advised that a lawyer was purporting to act on their behalf.

In none of these cases was any plaintiff requested or expected to contribute to the costs of litigation despite his or her ability to do so. All of the lawyers participating looked only to the NAACP or one of its affiliated organizations for their orders and their compensation.

In addition to facts learned upon the investigations made by this Committee, information has been obtained by the Committee from the State of Texas which enjoined the NAACP and the Defense Fund from doing business there. Information was also obtained from Florida which investigated the activities of the NAACP and the Defense Fund in that State. In brief it was found in both States that, wherever activities of the NAACP and the Defense Fund have been brought to light a pattern of solicitation of business for lawyers, of obtaining "plaintiffs" by false pretenses, of total control of the litigation by persons other than the plaintiffs, and the financing of litigation at no cost to the plaintiffs invariably appeared. As shown, the same pattern of behavior has been observed by this Committee on its investigation of activities in this State.

Practices of Others

On October 28, 1957, and toward the close of the several hearings before it, the Committee became advised by the testimony of Julian A. Sherman, Eastern Representative of the Claims Research Bureau of the Association of American Railroads, that there had occurred in Virginia, within the last few years, not less than sixteen instances where lay persons in Virginia had actively solicited injured railway employees to seek the legal services of non-resident lawyers.

The testimony given before the Committee by Mr. Sherman was supported by various documents, including written statements executed by each of the solicited railway employees. All these documents are among the Committee's records. In all instances but one, the lawyer on whose behalf the solicitation was made was Bernard M. Savage, a resident and practitioner of Baltimore, Maryland. The other lawyer for whom such solicitation was made was Bruneau E. Heirich, a resident and practitioner of Chicago, Illinois.

The lay persons making such solicitations on behalf of Bernard M. Savage of Baltimore, Maryland were: Julian Alford of Portsmouth, Virginia; W. F. Aliff of Shawsville, Virginia; C. G. Bond, Richmond, Virginia; Louis K. Dyer of Arlington, Virginia; C. C. Harrill, Jr., of Richmond, Virginia; a Mr. Hunter of Carrsville, Virginia; K. H. "Casey" Jones of Roanoke, Virginia; O. G. Massey of Richmond, Virginia; H. T. Southworth of Richmond, Virginia; Norris W. Tingle of Baltimore, Maryland; and Floyd Vaughn of Portsmouth, Virginia.

The solicitation on behalf of Bruneau E. Heirich of Chicago, Illinois was made by a Mr. Head, apparently of Clifton Forge, Virginia.

The Committee was further informed that, in several instances, the non-resident lawyer associated with him in the handling of the case a lawyer qualified and practicing in Virginia. Because of the brief amount of time between the testimony of Mr. Sherman and the filing of this Report, the Committee has not had the opportunity to determine the identity of the lawyers of Virginia who are so involved or whether they were aware of the means by which such cases were obtained by the non-resident lawyers.

As had been mentioned earlier in this Report, the Committee investigated the activities and behavior of the Defenders of State Sovereignty and Individual Liberties, the Virginia White Citizens' Council, the Fairfax Civic Council, the Virginia League and the Peninsula Citizens' Council, and found no evidence indicating the commission by either of those groups of barratry or other related offenses.

Conclusions

As a result of information obtained by the Committee on its investigations, a large part of which has been recited under the heading "Findings of Fact", the Committee has reached the following conclusions.

1. The *Common Law Offense of Champerty* has been committed by Bernard M. Savage of Baltimore, Maryland.

2. The *Common Law Offense of Maintenance* has been committed by:
National Association for the Advancement of Colored People, Inc.; NAACP Legal Defense and Educational Fund, Inc.; Virginia State Conference of NAACP Branches; Norfolk Branch of NAACP; Charlottesville Branch of NAACP; Arlington County Branch of NAACP; Newport News Branch of NAACP; Greensville County Branch of NAACP; Mecklenburg County Branch of NAACP; Charlotte County Branch of NAACP; Lancaster County Branch of NAACP; Isle of Wight County Branch of NAACP; and Sussex County Branch of NAACP.

3. The *Common Law Offense of Barratry* has been committed by:
National Association for the Advancement of Colored People, Inc.; Virginia State Conference of NAACP Branches; Oliver W. Hill of Richmond, Virginia; Spottswood W. Robinson, III, of Richmond, Virginia; W. Lester Banks of Richmond, Virginia; Bernard M. Savage of Baltimore, Maryland; K. H. "Casey" Jones of Roanoke, Virginia; O. G. Massey of Richmond, Virginia; and Norris W. Tingle of Baltimore, Maryland, and Floyd Vaughn of Portsmouth, Virginia.

4. The *Statutory Offense of Running and Capping*, as defined by Secs. 54-78 through 54-83.1 of the Code of Virginia, has been committed by: National Association for the Advancement of Colored People, Inc.; Virginia State Conference of NAACP Branches;

Norfolk Branch of NAACP; Charlottesville Branch of NAACP; Newport News Branch of NAACP; Arlington County Branch of NAACP; Greensville County Branch of NAACP; Mecklenburg County Branch of NAACP; Charlotte County Branch of NAACP; Lancaster County Branch of NAACP; Isle of Wight County Branch of NAACP; Sussex County Branch of NAACP; W. Lester Banks of Richmond, Virginia; W. F. Aliff of Shawsville, Virginia; C. G. Bond of Richmond, Virginia; Louis K. Dyer of Arlington, Virginia; a Mr. Hunter of Carrsville, Virginia; K. H. "Casey" Jones of Roanoke, Virginia; O. G. Massey of Richmond, Virginia; H. T. Southworth of Richmond, Virginia; Norris W. Tingle of Baltimore, Maryland; and Floyd Vaughn of Portsmouth, Virginia.

5. The *Statutory Offense of the Unauthorized Practice of Law*, as recited by Sec. 54-44 of the Code of Virginia, and as defined by Rule I of the Rules of the Virginia State Bar, has been committed by: National Association for the Advancement of Colored People, Inc.; NAACP Legal Defense and Educational Fund, Inc.; Virginia State Conference of NAACP Branches; W. Lester Banks of Richmond, Virginia; Bernard M. Savage of Baltimore, Maryland; and Norris W. Tingle of Baltimore, Maryland.

6. The *Offense of Unprofessional Conduct*, as defined by Canons 16, 23, 35 and 47 of the Canons of Professional Ethics, and as made punishable by Sec. 54-74 of the Code of Virginia, has been committed by the following lawyers: Victor J. Ashe of Norfolk, Virginia; Edwin C. Brown of Alexandria, Virginia; Roland D. Ealey of Richmond, Virginia; Oliver W. Hill of Richmond, Virginia; J. Hugo Madison of Norfolk, Virginia; Martin A. Martin of Richmond, Virginia; Spottswood W. Robinson, III, of Richmond, Virginia; W. Hale Thompson of Newport News, Virginia; Samuel W. Tucker of Emporia, Virginia; and Phillip S. Walker of Newport News, Virginia.

In addition to determining whether these offenses have been committed, the Committee is charged with the duty of determining whether the laws prohibiting such offenses are being administered and enforced. In its performance of this duty, the Committee further finds that those responsible for the enforcement of laws have neither charged, nor proceeded against, any of the organizations, groups, or individuals mentioned in the preceding numbered paragraphs for their commission of the offenses therein recited.

Recommendations

The Committee having observed the manner in which barratry and other related offenses against the administration of justice have been committed, and having further observed the lack of enforcement of those laws, makes the following recommendations:

1. Because of the flagrant disregard of Sec. 54-44 of the Code of Virginia making unlawful the unauthorized practice of law, and because the present penalty provided for violation of that section is apparently of little or no deterrent, the Committee recommends that such statute be amended to provide a substantially increased punishment for its violation. Because the vast majority of the Committee's efforts during the preceding months have been devoted to the examination of witnesses and the gathering of other evidence, the Committee has not had sufficient time to prepare recommended legislation of other character.

   Between the filing of this report and the convening of the Regular Session of 1958, attention will be directed to these matters so that when that Session convenes such appropriate legislation as seems necessary can be offered.

2. In view of the numerous recited instances in which certain lawyers of Virginia have been guilty of unprofessional conduct, and certain organizations and individuals have been engaged in the unauthorized practice of law, the Committee recommends that the General Assembly refer such matters to the Virginia State Bar with the request that it take appropriate steps to enjoin and punish the offenders by the means available to it. The Committee further recommends that it be authorized to make available its records to the Virginia State Bar in aid of such action.

3. It having further been found by the Committee that certain organizations and individuals recited in the Conclusions of this Report have been guilty of committing the offenses of champerty, maintenance, barratry, running

and capping and unauthorized practice of law, it is recommended that the General Assembly refer such matters to the local Commonwealth Attorneys having jurisdiction to act in those areas where such offenses have been committed with the request that the offenders be proceeded against as provided by law.

4. The Committee rcommends that the General Assembly request of the Virginia State Bar that it forthwith perform the duty required of it by Chapter 47 of the Acts of Assembly, Extra Session of 1956.

5. The Committee has been functioning for little more than a year. Much of that time has been spent in litigation, since several of the groups under investigation have employed devious means to defeat the disclosure of their activities. Much remains to be done, and other lines of approach which the Committee began, but was unable to pursue to conclusion, should be explored completely. In order to consider fully the enforcement of laws concerning barratry and related offenses against the administration of justice, and to continue its investigation of the fields under observation, it is recommended that this Committee be continued by the General Assembly of 1958.

Concluding Statement

We wish to express our appreciation to the many persons, groups and organizations who have assisted the Committee in its work. All offices and agencies of the State and its political subdivisions have cooperated with the Committee to the greatest possible degree and we acknowledge our indebtedness to them. Especially do we commend the assistance rendered by the office of the Attorney General and the office of the Division of Statutory Research and Drafting.

The Committee cannot conclude this report without expressing its appreciation of the labors of its counsel, Mr. King. He has been at all times most capable and courteous and has done much to advance of the work of the Committee. Had the Committee not had the benefit of his services, our work would have been far more difficult. He has been diligent beyond the call of duty in advancing the work of the Committee which is of vital interest to the best interests of the Bar of this Commonwealth.

The Committee urges upon the General Assembly of Virginia the adoption of the recommendations made herewith.

Respectfully submitted,

John B. Boatwright,
Chairman
E. Almer Ames, Jr.
Earl A. Fitzpatrick
William F. Stone
J. J. Williams, Jr.

* * *

Appendices

[*The Committee's list of appendices, which are omitted, is set out below.*]

ADMINISTRATIVE AGENCIES

PUBLIC ACCOMMODATIONS
Hotels—New York

Mrs. David KAPLAN v. VIRGINIA HOT SPRINGS, INC. (owner and operator of The Homestead)

State Commission Against Discrimination, New York, December 4, 1957, Case No. CP-4238-56.

SUMMARY: Mrs. Kaplan, a person of Jewish faith, filed a complaint against the operators of a hotel in Virginia with the New York State Commission Against Discrimination. The complaint charged that the hotel corporation, through an office maintained in New York City, had refused her accommodations at its hotel, The Homestead, solely because of her religion. The Commission appointed an Investigating Commissioner to make a preliminary investigation. The Investigating Commissioner found probable cause to credit the allegations of the complaint but recommended that the case be closed, subject to reopening, because the hotel corporation had closed its office in New York City.

CARTER, Investigating Commissioner.

DETERMINATION AFTER INVESTIGATION

On June 1, 1956, Mrs. David Kaplan, residing in New York City, made, signed and filed with the Commission a verified complaint charging The Homestead, a hotel in Hot Springs, Virginia, having an office in the Barclay Hotel, New York City, with an unlawful discriminatory practice relating to a place of public accommodation, resort or amusement, in that between April 12 and April 17, 1956, her application for a reservation at respondent's hotel was rejected because of her creed.

[*Complaint*]

For particulars, the complaint alleges, in substance, that on April 12, 1956 at about 2 P.M., complainant applied at respondent's New York City office for a reservation at respondent's hotel for herself and her husband for the period from July 22 to August 4 at the rate of $34 per day for two persons; that the lady in attendance filled out a reservation form and informed complainant that she would send her application to the Virginia office and that complainant would be notified by mail from Virginia or by telephone from the New York office within six days; that on April 17, complainant received a letter from respondent's Virginia office advising her that "we have no space available for the summer;" that on the same day that complainant applied for a reservation and about a half hour later, a Mrs. Valerie Courtenay, residing in New York City, applied at the same New York City office for a reservation at respondent's hotel for herself and her husband for the period from July 20 through August 4 at the same rate of $34 per day for two persons; that on April 17, the lady at the New York City office telephoned Mrs. Courtenay at her home telling her that her reservation had been confirmed and accepted; that Mrs. Courtenay had never before patronized the respondent's hotel; that complainant believes respondent's statement that it "has no space available for the summer" to be false; that her application for a reservation was rejected because she is of the Jewish faith and that the Anti-Defamation League of B'nai B'rith has informed complainant that their files show that over the years respondent has carried on a policy of discrimination against would-be guests of the Jewish faith.

[*Investigation Directed*]

After the filing of the complaint, the Chairman designated me as the Investigating Commissioner to make the investigation of the complaint. I have made an investigation of the complaint; I have twice conferred with representatives of the respondent; I have afforded complainant and respondent full opportunity to present factual and legal memoranda in support of their contentions; and each has submitted such memoranda to me.

The Homestead is a large resort hotel situated in Hot Springs, Virginia, owned and operated by Virginia Hot Springs, Inc., a Virginia corporation. In accordance with Section 297 of the Law, I have made and entered a short form order herein, amending the complaint so that the name of the respondent appearing therein is changed from "The Homestead" to "Virginia Hot Springs," Inc. (owner and operator of The Homestead.)"

[*New York Office*]

The Homestead is open for business from March through November of each year. During the spring and fall it handles chiefly conventions and during the summer it caters primarily to individual guests. For some years past, respondent operated a New York City office through which it solicited guests. Respondent has never filed with the New York State Department of State a statement and designation seeking authorization to do business within the State of New York.

The New York City office was operated at the Barclay Hotel and was staffed by two employees of the respondent, one of whom was the manager of the office. The entrance door had a glass panel on which appeared respondent's emblem and the inscription "The Homestead, Hot Springs, Virginia."

The Commission's field representative was advised by the respondent's New York manager as follows:

The New York office accepted applications for reservations personally, by mail or by telephone and sent them to the Virginia office for acceptance or rejection. When a request for a reservation was made, the manager would fill out a form, supplied by respondent, setting forth pertinent information with respect to the guest and the desired accommodations and duration of stay. The manager would then type this information in duplicate on Homestead's interoffice memorandum forms, containing the notation, "From: New York Office," the original of which she would mail to the Virginia office and a copy of which she would retain in the New York office files. Four or five days after the mailing of the interoffice memorandum, the New York office would receive an answer from the Virginia office as to acceptance or rejection. The New York office would then notify the applicant by mail or by telephone as to acceptance or rejection. If the notification to the applicant was by mail, a copy of the letter would be sent to the Virginia office; if by telephone, a notation would be made in the New York office file. In some cases, the Virginia office would write directly to the applicant and in such cases the New York office would receive a copy of the letter for its files.

Practically every day, the manager of the New York office would speak on the telephone to The Homestead's Virginia office.

The stationery used at the New York office was the same type as that used by respondent at its Virginia office and was supplied by respondent. The New York office rent and the salaries of its employees were paid by respondent. The employees at the New York office had prior work experience at the respondent's hotel in Virginia and were familiar with its rooms, accommodations and services.

Respondent maintained a commercial check account at a New York City bank for the purpose of purchasing railway tickets for patrons desiring this service. Checks on this account were drawn by the manager of the New York office and if the bank balance became too low, respondent would make additional deposits.

[*Files Removed*]

When the Commission's field representative first visited respondent's New York office on June 19, 1956, it had five metal file cabinets containing its business records for the past three or four years. As part of the investigation, the field representative requested permission to examine these files. The manager refused to allow such examination, stating that permission would have to be obtained from respondent's offices in Virginia. When the field representative returned for further investigation on June 28, 1956, three

of the five file cabinets had been removed from the office. The manager told the field representative that after she informed the Virginia office of the field representative's visit, and between June 20 and June 22, three files had been removed by the home office. She stated that what remained were "the working files."

The Manhattan telephone directory contains the following listing:

"Homestead Hotel of Hot Springs, Virginia
Barclay Htl. PLaza 8-2490."

The applications for reservations made by complainant and Mrs. Courtenay were forwarded to the Virginia office by the New York manager at the same time, on the day they applied. The New York manager had in her files a copy of the letter of rejection sent to complainant and a copy of the letter of acceptance sent to Mrs. Courtenay. A notation appeared on the letter of acceptance that the manager telephoned Mrs. Courtenay to confirm the reservation. The New York manager clearly recalled the visit of complainant but did not recall Mrs. Courtenay's visit. Mrs. Courtenay had never been a guest at respondent's hotel.

[*Accommodations Available*]

When she visited the New York office for the second time, the Commission's field representative examined a list containing about thirty names of applicants who had applied at the respondent hotel in June, 1956, and who had been accepted for reservations for June, July and August, 1956, thus indicating that the statement made to the complainant in April 1956 that "we have no space available for the summer" was not true. None of the names on the list appeared to the field representative to be Jewish-sounding names.

The Anti-Defamation League of B'Nai B'rith, appearing on behalf of the complainant, submitted documentary evidence to me covering a period from 1942 through March, 1956, indicating that applicants for accommodations at respondent's hotel, having Jewish sounding names, were rejected, whereas applicants with non-Jewish sounding names applying at about the same time received acceptances. Included in said documentary evidence is a reply from respondent to an applicant in California which states:

"Our clientele is overwhelmingly Gentile and they do not welcome Jewish additions."

and a reply from respondent to a travel agency in Minnesota, which states:

"I don't know where you got the information that we want Jewish patronage. Occasionally we take conventions which have some Jewish members, but for other business we take none that we can possibly help and under no circumstances ever pay a commission on such business."

A summary of said documentary evidence was submitted to respondent's attorney and respondent did not dispute the veracity of the documentary evidence.

[*New York Office Closed*]

In August, 1957, respondent submitted to me an affidavit made by its attorney stating that:

"On or about July 12, 1957, THE HOMESTEAD closed its office at the Barclay Hotel, 111 East 48th Street, New York City, discharged its employees, cancelled its lease with said hotel and closed its bank account in New York City, and at the present time THE HOMESTEAD no longer has any business office in the State of New York and is not transacting business in this state."

From the various memoranda submitted to me by complainant and respondent, the following three major issues and the respective contentions of the parties are presented:

1. *As to jurisdiction*—Complainant contends that the Commission has jurisdiction over the person of the respondent and over the subject matter of the proceeding. Respondent contends that at the commencement of this proceeding the Commission did not have jurisdiction over the subject matter.

2. *As to the merits*—Complainant contends that she was rejected because of her creed. Respondent denies any discrimination against complainant or against any applicant because of creed and states that it is highly selective in its choice of guests, basing its selection on economic and social status.

3. *As to the issue being moot*—Complainant contends that the closing of the New York office did not make the issue presented

herein moot, and she urges the Commission to proceed with all of the procedural steps through a hearing and a cease and desist order. Respondent contends that the closing of the New York office has rendered the issue presented moot, that "It will serve no effective purpose to continue this action and, therefore, it should be dropped."

I have carefully considered all of the facts and circumstances herein and all of the factual and legal contentions of the respective parties and it is my determination as Investigating Commissioner that:

1. *As to jurisdiction*—From the facts herein, it is clear that the Commission has jurisdiction over the person of respondent and respondent itself does not seriously contest this point. (International Shoe Co. v. Washington, 326 U.S. 310; Travellers Health Association v. Virginia, 339 U.S. 643; Touza v. Susquehanna Coal Co., 220 N.Y. 259).

As to jurisdiction over the subject matter, it appears to me that this proceeding, instituted under the Law Against Discrimination, basically concerns the relationship of innkeeper and guest. In the instant case, the inkeeper has its hotel in Virginia and the guests in question reside in New York State. Here, the acts of the parties, which combine to create the relationship of innkeeper and guest, started in New York and terminated in New York, and, between the start and the finish, additional material acts relating to the relationship occurred in New York.

[*Activities in State*]

Although the hotel is situated in Virginia, the innkeeper did not confine its activities to that state but, actively sought, solicited and obtained guests in the City and State of New York through the medium of its New York City office and its staff of employees there. The New York office accepted applications for reservations, filled out the necessary forms, sent them to the Virginia office, retained copies of those forms for its own files, telephoned the Virginia office daily, received replies and communicated such replies to New York applicants, and where replies were sent directly to applicants, received a copy of such reply for its files.

In connection with the services rendered by it, the New York office utilized a bank account of the respondent at a New York City bank and the New York office was listed in respondent's advertisements. Furthermore, the Manhattan Telephone directory contains a listing of the New York office.

The applications for reservations made by complainant and Mrs. Courtenay followed the procedure outlined. Both of them filed applications for reservations at the New York office. Their applications were processed by the New York office and their rejection and acceptance, respectively were received by said office. In the case of complainant's rejection, the original letter was sent to complainant's home in New York and a copy was sent to the New York office. As to Mrs. Courtenay's acceptance, the original letter was sent to the New York office, which telephoned the information to Mrs. Courtenay.

It is clear that various substantial and integral parts of the acts which taken together and in combination would create the relationship of innkeeper and guest occurred within the territorial confines of the State of New York. In fact, the acts which occurred within this state were indispensable parts of the whole transaction and it is my view that they were sufficient to vest this Commission with jurisdiction over the subject matter of this proceeding.

[*Jurisdiction Continues*]

It is a settled principle that jurisdiction once acquired is not defeated by subsequent events, even though they are of such character as would have prevented jurisdiction from attaching in the first instance. (Primavera v. Primavera, 195 Misc. 942, 945; 90 N.Y.S. 2d 731, 735; 15 Corpus Juris, Courts, sec. 135; 21 Corpus Juris Secundum, Courts, sec. 93) Under Section 297 of the Law Against Discrimination the instant proceeding was commenced on June 1, 1956 when the complainant made, signed and filed with the Commission a verified complaint charging respondent with committing an unlawful discriminatory practice in April, 1956. On the day that the complaint was filed, the Commission acquired jurisdiction over the person of the respondent and over the subject matter of this proceeding; and the subsequent events, more particularly, the closing of respondent's New York office did not divest the Commission of its originally acquired jurisdiction.

2. *As to the merits*—I find probable cause to credit the allegations of the complaint that com-

plainant's application for a reservation was rejected because of her creed. Respondent has offered no reasonable explanation as to the difference in treatment accorded to complainant and Mrs. Courtenay, both of whom applied at the same time for similar accommodations for about the same period of time. Complainant was rejected, while Mrs. Courtenay was accepted. The only logical conclusion is that complainant was rejected because of her creed which was reflected by her Jewish-sounding name. My conclusion on this point is reinforced by the documentary evidence presented to me by the Anti-Defamation League of B'nai B'rith, the substance of which is stated above; by the fact that the Commission's field representative was not permitted to examine respondent's records at its New York office and by the fact that respondent removed three of its file cabinets containing pertinent records from the New York office after its officers were apprised of the investigation.

During the course of the investigation, respondent contended that it has had persons of the Jewish faith as guests and at one conference its representatives offered to submit to me a list of the names of such Jewish guests. Respondent never submitted such a list. I am convinced from my investigation and all of the facts and circumstances before me, that, at the very least, the element of an applicant's Jewish faith has been a factor in the respondent's consideration as to his acceptance or rejection, and that applicants have been rejected by the respondent because of their Jewish faith.

3. *As to the issue being moot*—Respondent urges me "to drop" this matter without making any determination on the issue of probable cause to credit the allegations of the complaint because it has closed its New York office and therefore it contends the issue is moot. On the other hand, complainant urges me to proceed with this matter through the stage of hearing and cease and desist order.

I do not wholly agree with either party. As I see it, the fact that respondent closed its New York office should not and does not preclude me, as Investigating Commissioner, from making a determination on the issue of probable cause to credit the allegations of the complaint. The complaint before me alleges an unlawful discriminatory practice committed in April, 1956. The events which followed subsequently, and particularly the closing of the New York office, do not diminish my statutory powers or duties herein. In my view, I am required under the Law to make a determination on the issue of probable cause as to an unlawful discriminatory practice committed in April 1956, alleged in a verified complaint filed with the Commission. This I have done.

[*Remedies*]

The Law Against Discrimination (Sec. 297) provides that when a finding of probable cause is made, the Investigating Commissioner shall endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion, and in case of failure so to eliminate such practice, he shall direct a hearing.

Under the facts in the instant case, I see the situation as follows:

Respondent may continue to solicit business and carry on its activities in this state in connection with the creation of the innkeeper and guest relationship, provided that it does so in compliance with the New York State Law Against Discrimination. Respondent has not agreed so to act. It has not proposed to continue its activities in this State in compliance with the Law. What it proposes to do, and has in fact done, is to close its New York office which, according to the affidavit it has submitted to me, includes discharge of its employees, cancellation of its lease, and closing of its New York bank account. Said affidavit further states that "at the present time The Homestead no longer has any business office in the State of New York and is not transacting business in this state."

If this means that respondent has abandoned its activities in the State of New York with respect to the creation of an innkeeper and guest relationship, subject to the jurisdiction of this Commission, then there is nothing further to be gained at this time by proceeding with a statutory hearing under Section 297 of the Law. On the other hand, respondent has not committed itself to compliance with the Law should it resume its activities in the State of New York; and there can be no assurance that any temporary discontinuance of its activities here will remain permanent. (See National Labor Relations Board v. Denver Building & Construction Trades Council, 192 F.2d 577, 579). As a matter of fact,

respondent advertises in publications circulated in New York State and uses an Enterprise telephone number for phone calls placed in Manhattan, New York City, which enables such callers to phone respondent hotel in Virginia without charge.

Accordingly, in the exercise of my discretion, I am closing this case with the specific reservation that it is subject to reopening at any time upon sufficient evidence that respondent has resumed its activities in the State of New York without compliance with the Law Against Discrimination.

New York, New York
December 4, 1957

Elmer A. Carter
Investigating Commissioner

POLICE OFFICERS
Discriminatory Practices—District of Columbia

In the Matter of: NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE v. Robert V. MURRAY, Chief, Metropolitan Police, D. C.

Board of Commissioners of the District of Columbia, November 12, 1957.

SUMMARY: The District of Columbia Branch of the National Association for the Advancement of Colored People filed a complaint with the District of Columbia Board of Commissioners charging the chief of the Metropolitan Police with derelictions of duty. The charges involved racial discrimination and police brutality against Negroes. A public hearing was held by the Board resulting in findings that the charges were not substantiated.

OPINION

As a result of the transmittal to the Commissioners of the District of Columbia by Mr. Eugene Davidson, President, District of Columbia Branch of the National Association for the Advancement of Colored People (sometimes hereinafter referred to as NAACP), of the unanimous resolution of the Executive Committee, District of Columbia Branch of the National Association for the Advancement of Colored People, dated the 13th day of June, 1957, authorizing and directing its President to document certain charges against Chief of Police Robert V. Murray and to seek the removal of the said Robert V. Murray from his office as Chief of Metropolitan Police, D. C., and the subsequent filing with the Commissioners by the President of the District of Columbia Branch of the National Association for the Advancement of Colored People of certain charges and specifications against Chief of Police Robert V. Murray in support of said resolution, the Board of Commissioners of the District of Columbia, after causing certain investigations to be made, and after certain preliminary discussions, both hereinafter detailed, and following due notice to the respective interested parties, convened in the Board Room of the District Building a public hearing upon said charges and specifications.

[*Transmitted to Justice Department*]

Upon receipt from the complainant of the charges and specifications, the President of the Board of Commissioners, pursuant to direction of the Board, transmitted the same to Warren Olney, III, Assistant Attorney General, United States Department of Justice, with the following request:

> "* * * it is requested that a thorough investigation be made by the Civil Rights Division of the Department of the charges preferred by Mr. Davidson, as well as any evidence or indications that may come to the attention of the Department of any failure to protect and enforce the civil rights of individuals within this jurisdiction by the Government of the District of Columbia".

In reply thereto Assistant Attorney General

Olney wrote to the President of the Board of Commissioners, in part, as follows:

> "The material submitted to you by Mr. Davidson, copies of which were forwarded to me by your letter, do allege that in a number of instances the civil rights of certain individuals may have been violated by the use of more force than was necessary by a police officer in effecting an arrest or taking other police action. These allegations will be given appropriate study by the Civil Rights Section.
>
> "The remainder of Mr. Davidson's charges complain of alleged discriminatory practices in the administration of the Metropolitan Police Department but they are not suggestive of criminality. Consequently, they will not be studied by the Civil Rights Section, the authority of which is limited to possible violations of the criminal laws of the United States".

The Commissioners thereupon concluded that it was necessary for the Board of Commissioners to conduct i ɔwn hearing upon the charges.

[*Hearing Settled*]

Prior to the commencement of said hearing, several meetings were held at which procedures for the hearing were established. Among other things, it was agreed that the hearing would be confined to the charges and specifications filed by the NAACP, including such further specifications as might be filed by the NAACP up to twenty (20) days prior to the hearing, that the hearing would not be conducted until the Commissioners had received from the United States Department of Justice that Department's report concerning the cases of alleged police brutality specified by the NAACP, that the NAACP would have made available to it certain evidence peculiarly within the control of the Metropolitan Police Department, that members of the Police Force would be authorized, in accordance with Sections 14 and 58 of Chapter II of the Manual of the Metropolitan Police Department, to give to authorized representatives of the NAACP information within their knowledge concerning the matters set forth in the charges and specifications of the NAACP against the Chief of Police, and that witnesses would be required to testify under oath. Orders were issued to carry out the foregoing agreements. It was agreed that the hearing should commence on October 21, 1957.

The report of the United States Department of Justice was received and contained the folowing significant paragraph:

> "All of the subject complaints have been carefully considered by the Civil Rights Section of this Division. Each of those complaints which upon its face appeared to involve a possible violation of the civil rights statutes was investigated by the Federal Bureau of Investigation at our request. The results of these investigations have been carefully reviewed in the Civil Rights Section, and we have concluded that the evidence does not warrant criminal prosecution for violation of the civil rights statutes."

The following charges, with a number of individual specifications as to each charge, constitute the subject-matter of the hearing:

(1) That the Chief of Police, Robert V. Murray, did fail and refuse to implement police regulations regarding use of undue force in making arrests.

(2) That Chief of Police, Robert V. Murray, did permit and suffer the Police Department to protect those charged with the illegal enforcement of the law and did permit and suffer the Police Department to badger and intimidate witnesses against police officers.

(3) That the Chief of Police, Robert V. Murray, did, by his silence and refusal to act, condone an insult by a high police official to the head of a civic organization seeking to cooperate with the department.

(4) That the Chief of Police, Robert V. Murray, did have knowledge of, and did condone by his silence, the standard practice of the Police Department of charging victims of police brutality with resisting arrest and/or assault on police officers.

(5) That the Chief of Police, Robert V. Murray, has in the matter of recruitment, promotions and assignment of personnel embraced certain discriminatory practices based solely on the consideration of race and color.

(6) That Chief of Police, Robert V. Murray, did suffer and permit his office to prejudice

the prosecution of charges against a member of the Metropolitan Police Department, District of Columbia.

(7) That the Chief of Police, Robert V. Murray, has demonstrated by the conduct of his office, by utterances and omissions, his inadequacy to meet the requirements of a Chief of Police in a federally controlled city which should be a model to the nation.

Notwithstanding the agreement concerning the time limit for the filing of additional specifications in support of the foregoing charges, the NAACP was permitted in the course of the hearings to twice amend the specifications so as to include additional items not theretofore filed. Indeed, one such amendment concerned an incident which occurred during the course of the hearings.

Upon consideration of all the evidence presented, of the numerous exhibits introduced by the complainant and by Chief Murray, and of the arguments of counsel for the respective parties, the Commissioners have concluded:

[*Charges Not Sustained*]

The complainant has failed to sustain by the evidence presented any of the charges and specifications. In fact no evidence whatever was submitted by complainant in support of some of the specifications. On the other hand, the evidence submitted by Chief Murray completely answered the charges and specifications, including those on which complainant had presented no evidence. Viewing the evidence as a whole, the Commssioners are of the opinion that the complainant has failed to adduce any evidence upon which reasonable men could conclude that Chief of Police Robert V. Murray should be removed from office.

On the contrary, finding no evidence of racial discrimination or of police brutality, the Board of Commissioners wishes to re-assert its confidence in the competence of Chief of Police, Robert V. Murray, and the Metropolitan Police Department.

ROBERT E. McLAUGHLIN,
President

DAVID B. KARRICK

A. C. WELLING,
Colonel, U.S.A.
Board of Commissioners, D. C.

RACE RELATIONS
Commission Reports—Pennsylvania

The December, 1957, report of the Erie, Pennsylvania, Community Relations Commission is reproduced in part, below. The report concerns the reasons for conducting an educational program in race relations.

WHY AN EDUCATIONAL PROGRAM

"Things are not too bad in Erie." This statement will likely be made by someone in any group in which there is a discussion of intergroup or interracial matter. This statement is certainly true, and many instances could be cited of cooperative goodwill in intergroup relations. Erie does not have the problem of segregated schools or segregated medical facilities. In public accommodations there is a hopeful trend, most places are free of discrimination. There are achievements in the field of employment. Our old nationality neighborhoods are giving way to more freedom of choice as to the location of homes. The participation of all religious groups in the United Fund and Welfare Council marks a degree of public unity not found in many like communities.

This statement is, however, negative, and taking satisfaction that things are not worse may result in an unrealistic blindness to existing real problems. The participation of persons of Italian and Polish, as well as other nationality backgrounds, is in many aspects of community life less full than for those with more Anglo Saxon names. To a large degree, persons of such nationality backgrounds are absent from the managerial

field. Negroes undoubtedly meet the most rigid forms of discrimination. Negro women despite training and skill are unlikely to find employment in the secretarial field, Negro men are absent from the Retail Trade and other "meet-the-public" positions. Catholics and Protestants view one another with considerable suspicion, and lines of creative conmmunication seem limited indeed. Persons of the Jewish faith not only find themselves restricted in employment, but barred from social contact in private clubs with persons of whom they are the peers.

While the community has been freed of those groups who would advocate and promote bigotry, it cannot be said that we have achieved out of our diversities a creative climate in which any individual's quest for achievement and growth is unhampered by the accident of birth into a particular nationality, religious or ethnic group.

Because of information regarding discrimination in employment and at the request of a number of community leaders, the City Council, in 1954, declared it to be the policy of the City in the exercise of its police power and concern for public welfare to eliminate discrimination in employment and to actively work for the reduction of prejudice and the elimination of discrimination in all aspects of community life.

The Community Relations Commission was established by Ordinance and given a two fold function:

1. To administer the Fair Employment Practice section of the Ordinance.
2. To "formulate and carry out a comprehensive program designed to eliminate prejudice and discrimination."

In the fulfillment of this educational program, the Commission seeks the co-operation of all citizen's groups. That this is an important task is clearly apparent.

A few weeks ago, citizens of Pennsylvania were demonstrating in noisy and angry crowds on the front lawns of Levittown. Why? Because a young engineer had purchased a new home for his growing family? Because he was Negro? These citizens, unpleasantly but dramatically, demonstrated for us that the problem of segregation is our problem. Such noisy mobs, we have tended to associate with the slums of Chicago or the bed-sheeted Ku Klux Klan. It happened in Levittown, is Erie immune?

As the Suez crisis was coming to its climax, a year ago, Cairo newspapers gave front page coverage to Negro children being escorted to school by national guardsmen. Our efforts to win people of the world to democracy are handicapped by our failure to practice it at home. The gap between our beliefs and our practices is apparent to all who are not so blinded by prejudice as to be unaware of the consequences of their own acts.

The moral and ethic right of equality of opportunity and treatment free from prejudice of race, religion or color is repeatedly affirmed by all religious groups.

The growing migration of Negroes to the northern cities demands that we deal with the problems of prejudice on a first-hand basis in our own community.

The restriction of Negro housing which bars them from new or suburban developments and limits them to deteriorated housing in the central city, places an unfair burden upon the community, creates a visible symbol of second-class citizenship and greatly handicaps the efforts for urban renewal and redevelopment. Within our Peach-Sassafras redevelopment project, one-third of the families relocated in such projects are Negroes.

To continually prevent men from using their training and skills at its highest capacity merely because of race is morally and ethically indefensible and economically unsound. Not only is it a serious waste of human resources, it is also destructive of spirit and initiative. It diminishes wholesome family life, discourages education, contributes to delinquency and lawlessness and increases the public load of relief and community services.

In no area is the old adage, "an ounce of prevention is worth a pound of cure" more applicable. While no crosses have been burned, no bombs tossed, no threats of boycott nor have acts of mass violence been committed in our community, to wait for such demonstrations of the problem is to act with social irresponsibility.

Today, there is a hopeful trend in intergroup relations in our community. The co-operation of efforts of all citizens of goodwill will be necessary if we are to continue in a direction of progress. It would be folly to assume that if unattended, these problems would work out to a creative solution.

It may be that this problem will not be settled in this generation, and we shall pass it on to our children and grand-children. But, if that be so, let it be so only because we lack the insight and the skill. Let it not be said of us that we lack the will and courage to try. The problem is difficult. And, because it is difficult, we must do what we can today.

ATTORNEYS GENERAL

EDUCATION
Public Schools—Texas

The Attorney General of Texas was requested for an opinion by a committee of the state House of Representatives as to the constitutionality of proposed legislation. The bills commented on by the Attorney General concerned the operation and closing of public schools where military force was necessary for or was being used to maintain order. One of the bills was found to be constitutionally objectionable because of ambiguity in its wording. [See the similar legislation which was finally enacted, *supra* at p. 87.]

November 18, 1957
Opinion No. WW-323

Honorable W. S. Heatly,
Chairman
State Affairs Committee
House of Representatives
Austin, Texas

Re: Constitutionality of House Bill No. 1 and House Bill No. 2 of the Second Called Session, 55th Legislature, 1957.

Dear Mr. Heatly:

You have requested the opinion of this office on the constitutionality of House Bill No. 1 and House Bill No. 2, now pending before the State Affairs Committee of the House.

We shall first consider the provisions of House Bill No. 1. Section 1 of the latter bill recites the purpose of the bill in the following terms:

> "The purpose of this Act is to further provide for the maintenance of law, peace, and order in the operation of the public schools without resort to military occupation or control. The duties and powers vested in public officials and school boards under this Act shall be in addition to and cumulative of those with which they are vested under existing law for accomplishment of the purpose of this Act or any Section thereof."

Section 2 provides in substance that the Governor, through the Department of Public Safety, shall provide assistance when called upon by local authorities to maintain peace and order in the operation of public schools. Said section further provides that the Texas National Guard and other military forces shall not be used for the foregoing purposes. There is further provision that when a school board finds that violence or the danger thereof, cannot be prevented except by resort to military force or occupation of a public school, the school board may close the school and suspend its operation for such period as the board finds it necessary to maintain order and the public peace in accordance with the terms of this Act.

Section 3 provides that in the event the National Guard or any other military troops or personnel are employed or used upon order of any Federal authority on public school property or in the vicinity of any public school for direction or control of the order, operation or attendance at such school, the school board having jurisdiction may close the school and suspend its operation so long as said troops remain on or within the vicinity of the school for any such purposes.

Section 4 provides that when a school is closed, pursuant to the provision of Section 2 and 3, the salaries of school personnel shall not be affected and neither shall such closure affect state aid nor accreditation.

Section 5 provides that the school board shall use all reources of the district to provide out-of-classroom instruction for the pupils concerned and for the reopening of school at the earliest

possible time that peace and order can be maintained without the use or occupation of military forces.

Section 6 authorizes the Attorney General to assist public school boards in the defense of certain suits in the Federal Courts and further authorizes the Governor to transfer funds to the Attorney General for such purposes.

The foregoing are the provisions of House Bill No. 1, with which we are primarily concerned in passing upon the constitutionality of the bill. There are other provisions which we have carefully considered but, in the interest of brevity, have not mentioned.

In 78 C.J.S. p. 624, it is stated:

> "The power to establish and maintain systems of common schools, to raise money for that purpose by taxation, and to govern, control and regulate such schools when established is one of the powers not delegated to the United States by the federal constitution, or prohibited by it to the states, but is reserved to the states respectively or to the people, and the people through the legislature and the constitution have the right to control and prescribe the limits to which they will go in supplying education at public expense."

As early as 1845, provision was made in our State Constitution for the establishment and maintenance of a system of public free schools. Our present constitutional provision is embodied in Section 1 of Article VII, which reads as follows:

> "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

The foregoing constitutional provision devolves the duty of establishing and maintaining public free schools upon the Legislature. In defining the authority of the Legislature in the field of public education, the Supreme Court of Texas, in the case of Mumme v. Marrs, 40 S.W.2d 31, said:

> "Since the legislature has the mandatory duty to make suitable provision for the support and maintenance of an efficient system of public free schools, and has the power to pass any law relative thereto, not prohibited by the constitution, it necessarily follows that it has a choice in the selection of methods by which the objects of the organic law may be effectuated. The Legislature alone is to judge what means are necessary and appropriate for a purpose which the constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen."

The provisions of House Bill No. 1 are founded upon the premise that the presence of military troops in or about the public schools of the State is not conducive to the maintenance of an "efficient" system of public free schools. The bill, accordingly, provides that when troops are employed or used upon or in the vicinity of public school property or when such conditions of violence and disorder exist in connection with the operation of a public school that violence or the danger thereof cannot be prevented, except by resort to military force, the school may be closed for so long as either of the foregoing conditions exist. By its express terms, the bill operates exclusively against the evil sought to be avoided or corrected. The authority granted thereby comes into existence with the evil and ceases to exist when the latter has been eliminated. Its provisions apply alike to all of our schools and all of our citizens.

With the exceptions hereinafter noted, we think the bill contravenes no provision of either our state or federal constitution. Its provisions are entirely consistent with the constitutional mandate directed to the Legislature for the support and maintenance of an *efficient* system of public free schools. It also constitutes a legitimate exercise of the police powers of the State.

The foregoing conclusion is based upon the assumption that the terms of the bill will be observed and enforced in the manner and only for the purposes as set forth therein. An act constitutional on its face may become unconstitutional in the manner of its enforcement, but it is not within the province of this office to assume that an act will be enforced, or subverted to the accomplishment of unconstitutional purposes, contrary to its express terms.

A serious constitutional question is presented in connection with that portion of Section 2,

which prohibits the use of the Texas National Guard or other military forces to prevent violence and maintain peace and order in the operation of public schools. It is our view that this prohibition violates Section 7, Article IV of the Constitution of Texas, which, in speaking of the powers of the Governor, provides:

> "He shall be Commander-in-Chief of the military forces of the state, except when they are called into actual service of the United States. He shall have the power to call forth the militia to execute the laws of the state, to suppress insurrections, repel invasions, and protect the frontier from hostile incursions by Indians or other predatory bands."

As written, Section 2 would constitute an infringement upon the executive powers of the Governor. We understand, however, from your supplemental letter, dated November 14th, that this section will be amended by the State Affairs Committee, pursuant to the request of both the Governor and the author of the bill, to provide that the "Texas National Guard and other military forces shall not be called or used for such purposes by the Governor, or any other official authorized by the laws of this state, except as a last resort". It is our view that the proposed amendment would render said section constitutional.

This conclusion finds support in the case of Neff et al v. Elgin, 270 S.W.873 (Writ of error ref.), which sustained the constitutionality of the Act creating the Texas Ranger Force. The Court said:

> "The Governor is empowered to call forth the militia to execute the laws of the state, to suppress insurrections, repel invasions, and protect the frontier from hostile incursions by Indians or other predatory bands; but it is not intimated that the laws shall be executed by the militia alone, but the plain inference is that the militia is to be used *in executing the laws as against organized violation of laws, and the commission of crime.* . . .
>
> ". . . The Constitution . . . nowhere limits the authority of the Legislature in providing means to enforce the laws . . ."

It is entirely consistent with both our Constitution and our form of government that the use of the militia be limited to those circumstances where the civil arm of the State is inadequate to cope with the situation.

It has been suggested that Section 6, which authorizes the Attorney General to assist local school boards in the defense of certain law suits, and makes funds available for such purposes, is not germane to the general subject matter of the bill and hence constitutes a separate subject, contrary to Section 35 of Article III of the Constitution of Texas. We do not subscribe to this view. Incorporation in the body of an Act of the means by which its object may be accomplished does not render the Act obnoxious to the constitutional inhibition against bills containing more than one subject. Accordingly, an Act with one leading subject, which is expressed in its title, may contain appropriate provisions designed or tending to accomplish, effectuate or enforce the general object or purpose of the law. 39 Tex. Jur. 90 and the cases there cited. Although it is our view that Section 6 can be sustained as a part of House Bill No. 1, the Legislature might wish to incorporate the provision in a separate bill to remove any doubt relative thereto.

It is noted that the last sentence of Section 6, authorizes the Governor to transfer certain funds to the office of the Attorney General. This is a matter which is not included in the caption of the bill and should be so included.

It is also noted that the caption indicates that either the Governor or the local school board may close a school, but the body of the Act vests such authority solely in the school board. This is a discrepancy which you will doubtless wish to correct.

You are accordingly advised that it is the opinion of this office that House Bill No. 1, subject to the adoption of the proposed amendment to Section 2 thereof and other matters mentioned, is constitutional.

It is also our view that the same general principles which sustain the constitutionality of House Bill No. 1 are applicable to House Bill No. 2. Section 1 of the latter bill, however, provides in substance that when federal troops occupy a school, its grounds or yards, or adjacent property, either public or private, that the school shall close and remain closed so long as the troops remain. As written, the language is sufficiently broad to place school districts which are adjacent to, or inclusive of, military reservations in a doubtful status. The school would be compelled to close even though the presence of

the federal troops be in no way connected with or related to the operation of the school.

Section 1 of House Bill No. 2 would *require* and Section 3 of House Bill No. 1 would only *authorize* a school board to close the schools when federal troops were used. If a board should determine that the presence of troops rendered the school inefficient and ineffective to carry out its educational purpose, then in our opinion the board could close the schools and in doing so would not make Section 3 of House Bill No. 1, unconstitutional. However, if the troops did not impede the efficiency of the school nor render ineffectual its educational purpose, it could not close the schools simply to thwart the federal order. Because Section 1 of House Bill No. 2 would require the school to close irrespective of any effect the presence of federal troops might have upon the operation of the school, the bill is unconstitutional to this extent. The bill could, of course, be amended to remedy this defect.

Section 5 of House Bill No. 2 provides that no state funds shall be paid to any school district which fails to comply with the provisions of the Act. This provision cannot have any effect upon the distribution of the state available school fund. Section 5 of Article VII of the Constitution of Texas renders it mandatory that this fund be distributed annually to the several counties according to their scholastic population. This constitutional provision may be satisfied only by the distribution and application of the funds and not by withholding them. Attorney General's Opinion No. 0-4052 (1942); Jurnigan v. Finley, 90 Tex. 205.

We would suggest that a section be added to clearly exempt the normal operation of the Reserve Officers Training Program, National Guard and Texas State Guard, from in any manner calling into effect the provisions of either bill and also exempting school districts operating on Federal Military Reservations or adjacent thereto.

SUMMARY

House Bill No. 1 of the Second Called Session of the 55th Legislature, is constitutional subject to the matters noted.

House Bill No. 2 is unconstitutional for the reasons stated.

Very truly yours,
WILL WILSON
Attorney General of Texas
By
s/ Leonard Passmore
Assistant

EDUCATION
Attorneys Fees—Georgia

The Georgia state superintendent of schools requested the Attorney General's opinion on the legality of using public school funds to employ counsel to represent the county boards of education in suits filed against them. The Attorney General expressed the view that a county board has such authority when the controversy involves the power of a local board to act within its proper function. The opinion further stated that the county boards of education were not forced to accept legal representation by the county attorney.

November 20, 1957

Honorable M. D. Collins
State Superintendent of Schools
Department of Education
State Office Building
Atlanta, Georgia

Re: County Board of Education—
Employing Attorney.

Dear Dr. Collins:

I am pleased to acknowledge your request of November 15, 1957, concerning the legality of expending public funds for the purpose of employing attorneys to represent members of the county board of education in a law suit filed against said board members.

There is no general statute concerning the authority of a county or a county board of education to employ an attorney. Certain counties have county attorneys authorized by local legislation applicable to that county. Many counties and local boards of education have attorneys to

represent them without any express legislative authority.

The county board of education is a political subdivision of the State and serves as the agency through which the county acts in school matters. Board of Education v. So. Mich. Bank, 184 Ga. 641, 642. The Constitution of Georgia (Ga. Code Ann., §2-6801) places the control and management of the county schools under the county board of education. In construing and administering school laws, these boards are given wide discretionary powers. Boney v. Board of Education, 203 Ga. 152, Downer v. Stevens, 194 Ga. 598; Keever v. Board of Education of Gwinnett Co., 188 Ga. 299.

The county attorney is generally employed to represent the county commissioners or other governing authority as to the general affairs of the county. The county commissioners or other governing authority have no control or responsibility over the administration of school laws. It is inconceivable that the county board of education (a separate political subdivision charged with responsibilities for administering school laws) would be forced to accept the legal representative hired by the county commissioners or other county governing authority.

78 C. J. S. § 146, p. 950, 951, provides as follows:

> "A school district or other local school organization has power, either expressly or by implication, to employ counsel to render services in matters of proper school interest. . . . A school district has power to employ counsel where the controversy involves the power of a school district or an officer and the validity of the exercise of such power, but it has no power to employ counsel for a purpose outside its proper function, and the officers of such district or local school organization may not employ counsel at public expense to prosecute or defend actions by or against such officers in their individual capacities, unless authority is specifically granted by statute."

See also 47 Am. Jur. § 15, p. 308, 309.

The individual members of a local board of education are dedicated men who serve for little compensation (under the general law—not to exceed $10.00 for each day's actual service. Ga. Code Ann., § 32-904) in return for the vast responsibility which rests upon their shoulders. One need only look to Title 32 of the Ga. Code Ann. to see the vast maze of school law that concerns the administration of our public schools. Constantly in the background lies the great problems of continuing segregation and adequate financing. To me it is inconceivable that the intent of the framers of our Constitution or the members of our General Assembly in giving these boards control, management and responsibility as to local schools did not imply authority to employ adequate counsel to represent the board in litigation and give legal advice as to the administration of school laws.

As to the legality of expending public school funds for such a purpose, 47 Am Jur. §94, p. 365, provides as follows:

> "The question has arisen as to the propriety of the expenditure of school funds to pay counsel fees. There appears no doubt that school funds cannot be used to pay costs or counsel fees in actions brought ostensibly in relation to the public interest, but in reality for the benefit of private persons. But since the power to employ includes the power to compensate, it may be generally stated that school funds may be properly expended for the employment of an attorney by a school district for the protection of the public interests committed to it."

While public school funds can only be expended for school purposes (Burke v. Wheeler County, 54 Ga. App. 81; Ga. Code Ann., §§32-942, 94-3708), a school purpose is not limited to funds spent directly on education such as books, teachers, and school houses. It also includes bus drivers, repairmen, janitors, insurance on school property, etc.

On the basis of the above authority it is my opinion that a county board of education has the authority to expend public school funds for the purpose of employing attorneys to represent members of a county board of education where the controversy involves the power of a local board of education (local school district) or an officer and the validity of the exercise of such power. In my opinion the local board of education has no power to employ counsel for a purpose outside its proper function, nor may

counsel be employed at public expense to prosecute or defend actions by or against such board members in their individual capacities.

You also inquire as to whether or not a local board of education can pass a resolution on one date and change its resolution at a later date.

This question was answered in an opinion of this office dated May 31, 1954, copy of which is attached hereto.

With kindest regards and best wishes, I am

Sincerely yours,

Eugene Cook
The Attorney General

EC:nb
HALL
cc: Hon. B. E. Thrasher
State Auditor
State Capitol
Atlanta, Georgia

ORGANIZATIONS
Registration—Georgia

The Attorney General of Georgia submitted a letter to the mayors of various cities in that state concerning the enforcement of municipal business and occupational license taxes against organizations claiming a tax-exempt status. Accompanying this letter was a draft of an ordinance requiring the registration and filing of certain information by any organization upon the request of city officials. The proposed ordinance in form is virtually identical to Ordinance No. 10,638 of the city of Little Rock, Arkansas, passed on October 14, 1957 (see 2 Race Rel. L. Rep. 1158) and made applicable by local authorities there to the National Association for the Advancement of Colored People.

November 12, 1957

Dear Mayor:

Considerable interest has been expressed recently by some of our more populous cities with regard to the uniform enforcement of municipal business and occupaton license taxes and fees against certain organizations and corporations claiming to be exempt therefrom because of an alleged non-profit charitable or benevolent status.

Frequently, these organizations and corporations fail or refuse to adduce sufficient evidence which would enable municipal authorities to make a proper determination as to whether the exemption should be allowed.

As one method of remedying this situation, I am enclosing a rough draft of an ordinance which would require any organization or association claiming exemption to file stated information which would have a bearing on this question.

This ordinance would have to be varied to meet the requirements and provisions of each individual city charter. Moreover, the question as to whether the ordinance could be adopted in any given city under existing charter provisions would also have to be determined on an individual basis.

I will now briefly discuss some of the legal principles which would be pertinent with respect to adoption of the ordinance.

I.

Necessity for Existing Tax Or Licensing Authority In City Charter.

The value and applicability of the enclosed ordinance is dependent upon the existence of valid license ordinances already on the books, or if the city charter authorizes passage of such ordinances, upon their being passed along with the "information" ordinance.

In Lane v. Mayor & C. of Unadilla, 154 Ga. 577 (1), it is said:

> "Municipal corporations can levy no tax, general or special, upon the inhabitants of the municipality or upon property therein, unless the power to do so be plainly and unmistakably conferred upon them by the

> State. * * * The burden is upon every political division of the State, which demands taxes from the people, to show the authority to exercise it in the manner in which it has been imposed."

See also in accord, Lewis & Holmes Motor Freight Lines Corp. v. Atlanta, 195 Ga. 810, 812-13, where it was said: "Municipal corporations, unlike the sovereign state, possess no inherent power of taxation. The exercise of such power is dependent upon legislative or constitutional grant."

Statutes authorizing municipalities to impose taxes on occupations are to be strictly construed. Publix-Lucas Theaters, Inc. v. Brunswick, 206 Ga. 206, 210.

Therefore, we may conclude at the outset that before the proposed ordinance would be of any value, the charter of the city in question granted by the General Assembly must *clearly* confer on that city the power to impose license or other taxes as referred to in the "information" ordinance. The tax department informs me that as a practical matter, most city charters enacted by the General Assembly do contain such authority.

II.

Question As To Necessity Of Express Charter Authority For Information Ordinance.

The next question which arises is whether specific authorization for the "information" ordinance itself would have to be found in a given city charter enacted by the General Assembly, or whether the power might be implied.

The powers which a municipality may exercise must be derived from its charter or from general laws of the state. City of Macon v. Walker, 204 Ga. 810, 812 (2). Municipalities "can exercise only such powers as are conferred on them by law, and a grant of power to such corporations must be strictly construed; and the corporation can exercise no powers except such as are expressly given or are necessarily implied from express grants of other powers." In case of reasonable doubt as to any given power, it is resolved against the municipality. Beazley v. DeKalb County, 210 Ga. 41 (1); Irwin v. Torbert, 204 Ga. 111, 116; Kirkland, et al. v. Johnson, et al., 209 Ga. 824 (3); Jewel Tea Co. v. City Council of Augusta, 59 Ga. App. 260. In the exercise of its implied powers a municipality has the right to adopt all ordinary or usual means necessary to full execution of its express powers. Transylvania Casualty Ins. Co. v. Atlanta, 35 Ga. App. 681 (1) (holding that city expressly authorized to regulate jitney buses could require such companies to furnish indemnity bond for benefit of persons injured therein).

In Coca-Cola Co. v. Atlanta, 152 Ga. 558, writ of error dismissed, 260 U. S. 760, it was held that a city authorized under its charter and ordinances to tax corporate shares would have authority to bring action for discovery in equity against the corporation to require it to divulge the names of its shareholders so that assessments could be made on their respective shares.

However, in City Council of Augusta v. Dunbar, 52 Ga. 387 (3), it was held:

> "Unless express authority to do so be granted by the Legislature, a municipal corporation has no power to enforce the payment of taxes due it by affixing a penalty of an additional per centum for failing to pay promptly when due."

This case raises a serious question as to whether a charter provision authorizing a city to levy occupation or business taxes could be construed as impliedly authorizing the city to impose a penalty for failure or refusal to supply information bearing on a taxpayer's status with respect to an exemption.

Of course, it would seem reasonable to imply the authority of the city to require of a person claiming exemption that he produce all information which might be pertinent in determining the validity of the claimed exemption.

The Constitution requires that all taxation be uniform. Art. VII, Sec. I, Par. III (Code §2-5403). Occupation taxes must be uniform on the same class of subjects. Atlanta Nat. Building & Loan Ass'n. v. Stewart, 109 Ga. 80 (5). Moreover, "all laws exempting property from taxation, other than the property herein enumerated (in §2-5405), shall be void." Art. VII, Sec. I, Par. VI (Code §2-5405). In Tarver v. Mayor & C. of Dalton, et al., 134 Ga. 462 (1), it was said:

> "A municipality can not exempt from taxation property which does not belong to any of the classes which the Constitution of this State permits to be exempted."

To require the divulging of information having a bearing on the tax collection is reasonable. In *United States v. Kahriger* (1953) 345 U. S. 22, 31-2, 97 L. Ed. 754, 762, in upholding the federal

act imposing a tax on persons engaged in wagering, which included registration provisions requiring the filing of information, it was said:

> "Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of names, addresses, and places of business. This is quite general in tax returns. Such data are distinctly and intimately related to the collection of the tax and are 'obviously supportable as in aid of a revenue purpose.' Sonzinsky v. United States, 300 U. S. 506, at 513, 81 L ed 772, 775, 57 S. Ct 554. The registration provisions make the tax simpler to collect."

On the basis of the foregoing considerations, it could reasonably be concluded that a municipality could, as a means of enforcing its taxing ordinances, require that all persons claiming exemption therefrom disclose any information having any relevancy in determining the validity of the claimed exemption. It is believed that such authority could be implied from an express grant of the power to tax, as being merely incidental to exercise of the express power. However, the usual and logical result of a failure to substantiate an exemption would be simply a denial of the exemption, and in view of the Augusta case (50 Ga. 387 [3], there is serious doubt that the power to impose a penalty for nondisclosure could be implied from a charter provision conferring only the power to tax. Of course, a local bill amending the city charter could always confer this power, and in any case, the city could simply deny the exemption where the association or corporation refused to comply with the demand for information.

However, the situation in any given case will depend upon the provisions of that particular city charter. It is quite possible that some city charters now in existence may contain provisions which would authorize such an ordinance as herein attached.

Please understand that I am not attempting to dictate to any city or suggest that you adopt any particular policy of tax enforcement. I am merely furnishing this material for your information, for whatever action, if any, you may desire to take.

With kindest regards and best wishes, I am

Sincerely yours,
Eugene Cook
The Attorney General

Proposed Ordinance

ORDINANCE NO.....

An ordinance requiring certain organizations functioning or operating within the city (or town) of .....to list certain information with the city clerk (or recorder), and for other purposes.

WHEREAS, it has been found and determined that certain organizations within the City (or Town) of ....., Georgia, have been claiming immunity from the terms of Ordinance No.....governing the payment of occupation licenses levied for the privilege of doing business within the city, upon the premise that such organizations are benevolent, charitable, mutual benefit, fraternal or non-profit, and

WHEREAS, many such organizations claiming the occupation license exemption are mere subterfuges for businesses being operated for profit which are subject to the occupation license ordinance: NOW, THEREFORE,

BE IT ORDAINED BY THE CITY (OR TOWN) COUNCIL OF THE CITY (OR TOWN) OF....., GEORGIA:

Section 1. The word "organization" as used herein means any group of individuals, whether incorporated or unincorporated.

Section 2. Any organization operating or functioning within the City (or Town) of..... ....., including but not limited to civic, fraternal, political, mutual benefit, legal, medical, trade, or other organization, upon the request of the City Authorities (or appropriate officials under individual city charter) shall list with the City Clerk (or other appropriate official) the following information within 15 days after such request is submitted:

A. The official name of the organization
B. The office, place of business, headquarters or usual meeting place of such organization.

C. The officers, agents, servants, employees or representatives of such organization, and the salaries paid to them.

D. The purpose or purposes of such organization.

E. A financial statement of such organization, including dues, fees, assssments and/or contributions paid, by whom paid, and the date thereof, together with the statement, reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization.

F. An affidavit by the president or other officiating officer of the organization stating whether the organization is subordinate to a parent organization, and if so, the name of the parent organization.

Section 3. This ordinance shall be cumulative to other ordinances heretofore passed by the City (or Town) with reference to occupation licenses and the collection thereof.

Section 4. All information obtained pursuant to this ordinance shall be deemed public and subject to the inspection of any interested party at all reasonable business hours.

Section 5. Any section or part of this ordinance declared to be unconstitutional or void shall not affect the remaining sections of the ordinance, and to this end the sections or subsections hereof are declared to be severable.

Section 6. Any person or organization who shall violate the provisions of this ordinance shall be punished (state punishment authorized by existing city charter). The City (or Town) Council in the enforcement of this ordinance shall have the power to seek injunctive relief.

Section 7. It has been found and determined by the City (or Town) Council that certain organizations operating within the City (or Town) of.....have failed to comply with the terms of Ordinance No.....governing the payment of occupation licenses, and as a result thereof, needed revenue is being lost, and the enactment of this ordinance will provide for more efficient administration of such ordinance. Therefore, an emergency is declared to exist, and this ordinance being necessary for the preservation of the public peace, health, and safety, shall take effect and be in force from the date of its approval.

* * *

Note: If it is determined that the existing city charter does not contain authority for the penalty provisions of Section 6, under the principles of law discussed in Part II of the accompanying letter, this Section could be altered so as to provide that upon failure of the corporation or organization to produce information required by the demand, its exemption would automatically be denied.

REFERENCE

Substantive Civil Rights Under Federal Legislation

I Introduction

The Thirteenth, Fourteenth and Fifteenth Amendments to the Federal Constitution, adopted shortly after the Civil War and often referred to as the Civil War Amendments, greatly enlarged the scope of federal power in the field of civil rights. These amendments (the Fourteenth particularly) have been given direct effect by the court in thousands of cases, but each of these amendments contains an enabling clause, which states that Congress has power to enact appropriate legislation to enforce the rights secured by the amendments. Under this grant of power, Congress has enacted extensive civil rights legislation. The first seven statutes, passed during the decade immediately following the War Between the States, are referred to collectively as "the Civil Rights Acts."

The Civil Rights Act of 1957, 71 Stat. 634, 2 Race Rel. L. Rep. 1011 (1957), is the most recent example of legislation passed to implement these amendments. This Act authorizes the appointment of a Federal Commission on Civil Rights, the primary function of which is to investigate alleged deprivations of voting rights, to study and collect information on deprivation of the right to equal protection of the laws, and to appraise the laws and policies of the federal gov-

ernment with respect to equal protection of the laws. The Commission is to submit reports and make recommendations to the President and Congress. Provision is made for an additional Assistant Attorney General. Part III, section 121, amends 28 U.S.C. § 1343 (1952), which deals with the jurisdiction of the federal courts in civil rights cases, by providing such jurisdiction in actions to recover damages or to secure equitable relief under any federal statute which provides for protection of civil rights. 42 U.S.C. § 1993 (1952) which gave the President power to use the armed forces in certain situations involving civil rights was repealed by section 122. Part IV of the 1957 Act then proceeds "To Provide Means of Further Securing and Protecting the Right to Vote." This purpose is achieved by amending section 2004 of the Revised Statutes, 42 U.S.C. § 1971, to include protection of the right to vote for national officers, and giving the attorney general power to institute "a civil action or other proper proceeding for preventive relief," specifically including application for injunction or restraining orders, against any person who is believed to have deprived or to be threatening to deprive a person of the rights secured by the amended section of the Revised Statutes. If a person is cited for an alleged contempt for violation of a federal court order issued to protect rights recognized under the Act, Part V of the Act provides that he may be tried with or without a jury, but if a conviction of criminal contempt by a judge results in a fine of $300 or more or in imprisonment in excess of forty-five days, the alleged contemnor may then demand trial de novo before a jury. For a discussion of federal contempt powers, see 2 Race Rel. L. Rep. 1051 (1957). Finally, the 1957 Act sets forth the qualifications of federal court jurors, amending 28 U.S.C. § 1861 (1952), which provided that qualifications of federal jurors were the same as those for state court jurors. The substantive provisions of this Act are set out, *infra*.

The primary purpose of this study is to set forth the present status of federal civil rights legislation. In order to do so, it will be necessary to provide some background material on the Civil Rights Acts, their construction and constitutionality. The sections of the Acts which relate to federal jurisdiction have been examined in a previous study. 2 Race Rel. L. Rep. 269, 276 (1957). The limitation of the effect of the Fourteenth and Fifteenth Amendments to action taken by the states, rather than by private individuals, has also been extensively treated, including decisions of the Supreme Court on the constitutionality of the legislation now under consideration. 1 Race Rel. L. Rep. 613 (1956). Consequently, this aspect of the present study will be dealt with briefly, showing only the result when the legislation was applied to a particular factual situation.

A subsequent study will analyze state qualifications for voting and constitutional limitations on the power of the state and federal governments in this area. Voting rights, therefore, will be given only such treatment in this study as is necessary to fulfill its general purpose.

II Historical Development

Prior to the Civil War Amendments, individual rights were protected primarily by state and local governments. Federal power in this respect was rather narrow, although there were several federal constitutional provisions applicable to civil rights, but not necessarily limited to this field. See *State Action*, 1 Race Rel. L. Rep. at 613-14. The Bill of Rights—the first ten amendments to the Federal Constitution—had been construed by Chief Justice Marshall as limitations only upon the actions of the federal government: "These amendments demanded security against the apprehended encroachment of the general government, not against those of the local government." *Barron v. Baltimore*, 7 Pet. 242, 250 (1833).

It has been suggested that Article IV, Section 2, of the Constitution, the privileges and immunities clause, could have been the basis of congressional civil rights legislation. Carr, *Federal Protection of Civil Rights* 34-35 (1947). Such a program was never attempted, however, and the construction given that clause after the Civil War would indicate that the power of the federal government under it was not so broad. It was interpreted in 1873 to forbid only state discrimination against citizens of other states in favor of its own, and not to apply to controversies between a state and its citizens. *The Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1873). See also *McKane v. Durston*, 153

U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894); *Detroit v. Osborne*, 135 U.S. 492, 10 S.Ct. 1012, 34 L.Ed. 200 (1890); *The Constitution of the United States, Annotated*, 686-87 (Corwin ed. 1952).

A. Post Civil War Amendments and Statutes

1. Thirteenth Amendment

The Thirteenth Amendment, adopted in 1865, provides:

> **Section 1.** Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 contains the enabling provision. This amendment is not limited to prohibiting state action, but reaches individual action as well, and congressional legislation based thereon will thus apply to any action, state or individual or corporate, which may be characterized as subjecting persons to slavery or involuntary servitude. Some of the proponents of the amendment apparently thought it would encompass more than bondage or peonage, and would guarantee the Negro certain civil rights—*e.g.*, free opportunity to work and move about. See McLaughlin, *A Constitutional History of the United States*, 654-55 (1935). However, the Supreme Court rejected any such contention and construed the amendment strictly to apply only to factual situations of bondage or peonage, and its scope is thereby limited. See *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883); *Slaughter-House Cases*, *supra*.

2. Civil Rights Act of 1866

In the year following the adoption of the amendment, Congress passed the first of the Civil Rights Acts—the Act of April 9, 1866, 14 Stat. 27, entitled "An Act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication." Apparently, the purpose of the Act was to render ineffective the so-called "Black Codes," which had been passed by several of the Southern states. See Appendix to Mr. Justice Black's dissenting opinion in *Adamson v. California*, 332 U.S. 46, 92, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) (hereinafter cited as Black's Appendix), for the congressional debates. The "Black Codes," according to Senator Trumbull, then Chairman of the Senate Judiciary Committee, deprived persons "of African descent of privileges which are essential to freemen." Black's Appendix at 99. Some examples of the provisions of these codes were given, including those subjecting the Negro to criminal punishment for failure to obtain a pass before travelling from one county to another, or for preaching "the gospel," and those subjecting any person who taught slaves to severe criminal punishment. Black's Appendix at 99-100.

Congress passed the 1866 Act over the veto of President Johnson, who believed that it was unconstitutional:

> "Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. . . . As respects the Territories, they come within the power of Congress, for as to them, the law-making power is the federal power; but as to the States no similar provisions exist, vesting in Congress the power 'to make rules and regulations' for them." Black's Appendix at 103.

The structure of this Act was relatively simple. It contained ten sections, the first of which enumerated certain specified rights and the remainder of which provided for the enforcement of the Act. Section one, the enumerating of rights, provided first for citizenship: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." It then declared that all citizens possessed, equally with white citizens, the following rights: to make and enforce contracts, to sue, to be a party, to give evidence, and to inherit, purchase, lease, sell, hold and convey real and personal property. All citizens should enjoy the full and equal benefit of all laws and proceedings for the security of person and property as enjoyed by white citizens, and the pains, punishment and penalties were to be similar. In short, Negroes were declared citizens of the United States, and discrimination in favor of white citizens, whether by state or individual action, was forbidden. Section two declared that deprivation of these rights was a misdemeanor, and provided punishment against any person who caused such a deprivation while acting under color of law, statute, ordinance regulation or

custom. In order to insure enforcement, United States district attorneys were required to institute the proceedings, and marshals and deputies were required to execute all warrants issued under the Act. If the marshal or deputy refused to execute the warrant or if any person knowingly hindered or obstructed the officer, criminal penalties could be assessed. The President, if he believed an offense under the Act had been or was about to be committed, was given power to direct the judge, marshal and district attorney to proceed to any place within the district in order to provide speedy arrest and trial to persons charged with violation of the Act, and if necessary, the President could call upon the army, navy or militia to prevent violations of the Act.

As noted previously, President Johnson had grave doubts about the constitutionality of this legislation, regarding it as an intrusion upon state authority. Members of Congress had also opposed the bill on this ground. See McLaughlin, *supra*, at 654. Few cases arose under this Act, but most of the decisions upheld its validity. *United States v. Rhodes*, Fed. Cas. No. 16,151 (C.C. Ky. 1866), was a prosecution for violation of section one of the Act by having refused to allow a Negro to testify in a state court against a white man. The court stated that it had no doubt that all of the provisions were constitutional, and cited decisions of state courts in Indiana and Maryland in support of that view. *In re Turner*, Fed. Cas. No. 14,247 (C.C. Md. 1867), concerned the validity of an indenture purporting to bind a Negro child, but not containing certain provisions for the security and benefit of the apprentice which were required by state law to be included in indentures of white persons. The court declared the indenture void as a violation of section one. However, some courts declared the Act unconstitutional. The Kentucky Supreme Court, for example, held that Congress had no power to render ineffective a Kentucky statute declaring Negroes incompetent to give testimony. *Bowlin v. Commonwealth*, 65 Ky. 5 (1867).

The constitutional issue was not whether Congress had the power to implement the Thirteenth Amendment, for the enabling provision of that amendment was specific on this point. Rather, it concerned the question of whether the Act of 1866 went beyond the scope of the power granted by the amendment, which, it was argued, included protection only against slavery or peonage. The doubts concerning the constitutionality of this legislation were influential in the proposal of and, perhaps, in the adoption of the Fourteenth Amendment.

3. Slave Kidnapping and Anti-Peonage Acts

During this same period two other statutes were passed by Congress under the enabling provision of the Thirteenth Amendment. These were the Slave Kidnapping Act of 1866, 14 Stat. 50, and the Anti-Peonage Act of 1867, 14 Stat. 546. Both of these laws, as suggested by their titles, were of limited application, and apparently their constitutionality was conceded. See discussion, *infra*.

4. Fourteenth Amendment

In June of 1866, two months after the first Civil Rights Act had been passed, Congress submitted the Fourteenth Amendment to the states for ratification. The language of the 1866 Civil Rights Act did, in some respects, anticipate that of the Fourteenth Amendment, and it has been suggested that Congress, in proposing the amendment, sought to place the substance of the Act beyond the reach of the Supreme Court and subsequent sessions of Congress. See Konvitz, *The Constitution and Civil Rights* 4-5 (1946). The ratification process was completed and the amendment became effective on July 28, 1868.

The purpose and intention of the framers has been the subject of considerable debate. It has been suggested that one purpose of Congress was to extend the limitations of the Bill of Rights to the states, to insure the validity of the Civil Rights Act of 1866, and to give Negroes citizenship. See *Adamson v. California, supra;* Flack, *Adoption of the Fourteenth Amendment* 94 (1908). Further, it has been contended that the privileges and immunities clause of that amendment, not the due process and equal protection clauses, was considered to be of primary importance, and that the framers intended, by the use of this clause, to reach individual, as well as state, action. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1330-33 (1952). The Supreme Court, however, has rejected most of these arguments. See *State Action*, 1 Race Rel. L. Rep. 613 (1956).

5. Fifteenth Amendment

The third of the so-called Civil War Amendments, the Fifteenth, became a part of the Con-

stitution on March 30, 1870. It provides that no citizen shall be denied the right to vote because of race, color or previous condition of servitude, and unlike the Fourteenth, applies to both state and federal action. See *State Action*, 1 Race Rel. L. Rep. 613 (1956).

6. Civil Rights Acts of 1870 and 1871

Shortly after the ratification of the Fifteenth Amendment, Congress began to implement these three amendments. The second Civil Rights Act, 16 Stat. 140, was adopted in May of 1870, and amended by the Act of February 28, 1871, 16 Stat. 433. The "Ku Klux Klan" Act, 17 Stat. 13, was passed on April 20, 1871, and the final legislation of this period was the Act of March 1, 1875, 18 Stat. 335. These four statutes, plus the Act of 1866, the Slave Kidnapping Act, and the Anti-Peonage Act are referred to collectively as the Civil Rights Acts, which the Reconstruction Congresses adopted apparently for the purpose of presenting a comprehensive civil rights legislative program under the Civil War Amendments.

The title of the Act of 1870, "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes," indicates that its primary purpose was to implement the Fifteenth Amendment. However, the statute specifically reenacted the Civil Rights Act of 1866. It declared that all citizens who are otherwise qualified to vote at any election by the people in any subdivision of a state or territory should be entitled to vote without distinction because of race, color or previous condition of servitude. Criminal sanctions could be used to enforce this right. Another important provision was the conspiracy section, providing that it would be a felony for two or more persons to band or conspire together or to go in disguise upon the public highway or upon the premises of another, for the purpose or with the intent to deprive any person of the free exercise or enjoyment of any right or privilege granted or secured by the Constitution or the laws of the United States or to violate the provisions of the Act.

The "Ku Klux Klan" Act, so called because its primary purpose was apparently to restrict the activities of that group, set out civil and criminal penalties for deprivation of rights under color of law, and made it a criminal offense to conspire together to go in disguise upon the public highway or upon the premises of another for the purpose of depriving any person or class of persons of equal protection of the law or equal privileges and immunities under the law. In addition, the President was given authority to suppress violence resulting in the deprivation of constitutional rights if the state authorities were either unable or unwilling to do so, and any officer who should, but did not, protect the rights of an individual was subject to civil action for damages.

7. Civil Rights Act of 1875

The Act of 1875 was the last of the Civil Rights Acts to be adopted during this period. Like the Act of 1866, it first stated the rights protected and then gave a remedy. All persons within the jurisdiction of the United States were declared to have a right to full and equal enjoyment of all places of public accommodation or amusement, including inns, public conveyances, theatres, etc. This right was subject only to the conditions and limitations established by law which were applicable alike to citizens of every race or color and without regard to previous condition of servitude. Any person who deprived another of these rights would be guilty of a misdemeanor and subject to fine or imprisonment or both.

The provisions of the Civil Rights Acts were codified in the Revised Statutes under many unrelated chapters in 1873, and in 1894 several of the provisions pertaining to suffrage were repealed. In 1909, when the criminal laws were recodified, many of the criminal sections were eliminated.

B. Judicial Construction of Civil Rights Legislation

Soon after their passage the Civil Rights Acts found their way before the Supreme Court, and many of the provisions were held unconstitutional or restricted in their scope. In the first place, the Thirteenth Amendment, although applying to individual and state action, was limited to factual situations characterized as bondage or peonage. Secondly, in a long line of cases the Fourteenth Amendment was held to apply only as a restriction on the actions of the state, not on acts of individuals, and the privileges and immunities clause of the amendment was restricted to protection of so-called federal rights. Moreover, the Fifteenth Amendment, which was

applicable to both federal and state action, was held inapplicable to individual action.

The conspiracy section of the Act of 1870 was limited in its application to those instances in which a citizen was deprived of the rights or privileges incident to national citizenship. *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1875). The section was, therefore, held to be inapplicable where the defendants in a criminal prosecution under this section were alleged to have deprived Negroes of the right to assemble peacefully, the right to bear arms, the right to life and liberty, the right to equal protection of the laws of the state and of the United States, and the right to vote. See *State Action*, 1 Race Rel. L. Rep. 613, 614-15 (1956).

The scope of the privileges and immunities clause of the Fourteenth Amendment should be noted in this connection. In the *Slaughter-House Cases, supra*, the Supreme Court had held that this clause was limited to prohibiting the state from depriving its citizens of the rights and privileges incident to national citizenship, not state citizenship. The court's list of these rights and privileges was revised in *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), which listed "among the rights and privileges" of national citizenship:

> ". . . the right to pass freely from state to state [citation omitted]; the right to petition Congress for a redress of grievances [citation omitted]; the right to vote for national officers [citations omitted]; the right to enter the public lands [citation omitted]; the right to be protected against violence while in the lawful custody of a United States marshal [citation omitted]; and the right to inform the United States authorities of violation of its laws [citation omitted]." 211 U.S. at 97.

The conspiracy section of the Act of 1871 was declared unconstitutional on the ground that it was directed against individual action, whereas under the Fourteenth Amendment Congress was empowered to provide protection only against state action. *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883). In that case twenty defendants had been indicted for seizing and beating four prisoners held by a Tennessee deputy sheriff. This same section was considered again in *Baldwin v. Franks*, 120 U.S. 678, 7 S.Ct. 656, 30 L.Ed. 766 (1887), and the court again held it could not constitutionally be applied to sustain prosecutions against private action. In this case several persons had allegedly conspired to run some Chinese aliens out of a California town in which they resided. These sections could not be applied to this case, even though a treaty with China provided that Chinese aliens should have the same rights and privileges as those enjoyed by the citizens "of the most favored nation." The *Civil Rights Cases, supra*, the leading decision on state action, held that the provisions of the Civil Rights Act of 1875, which provided for equal enjoyment of places of public accommodation and amusement and gave the aggrieved person a civil action for damages as well as subjecting the defendant to criminal penalties, were unconstitutional since they reached individual rather than state action. See *State Action*, 1 Race Rel. L. Rep. 613, 616-18 (1956), for an extensive treatment of these so-called "state action" cases. This case also held that these sections could not be supported under the Thirteenth Amendment, since the conduct involved did not result in the imposition of slavery or involuntary servitude on the victims. See also *Hodges v. United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 64 (1906) (the conspiracy section of the Act of 1870 was held unconstitutional when applied to a conspiracy to intimidate Negro laborers from working in a manufacturing establishment with the result that the Negroes broke their contracts with the employers and left); *United States v. Wheeler*, 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed. 270 (1920) (the conspiracy section was again held unconstitutional if applied to individual action—namely, forcibly deporting other persons from Arizona to New Mexico); *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926).

Several of the sections of the Civil Rights Acts which related to voting rights have also been declared unconstitutional under the Fifteenth Amendment. In *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 478 (1876), the Supreme Court held that Congress must restrict its legislation under this amendment to interference by the state based on race, color or previous condition of servitude, and since these sections were phrased broadly enough to reach any type of discrimination, they were unconstitutional:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could

be rightfully detained, and who would be set at large." 92 U.S. at 221.

The purpose and meaning of the Fifteenth Amendment was set forth by the court:

> "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous conditions of servitude." 92 U.S. at 217.

Further, in *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1903), the section of the Civil Rights Act of 1870 applicable to voting rights was held unconstitutional on the ground that the statute was directed against private persons as well as state action. Nor could this section be sustained under Section 4 of Article I of the Constitution which gives Congress power to regulate the selection of its own members, since it was phrased broadly enough to cover state elections as well.

For discussions of the asserted causes of the ineffectiveness of the efforts to protect civil rights under the Civil War amendments and statutes, see, Carr, *supra*, at 41; Berger, *Equality by Statute* 12 (1952).

C. Administration of Civil Rights Legislation

A Civil Rights section of the Criminal Division of the Department of Justice was first created by the Attorney General of the United States in 1939. At present, cases involving civil rights are handled by a separate Civil Rights Division of the Justice Department, headed by an assistant attorney general authorized by the Civil Rights Act of 1957. Heretofore, the Civil Rights Division has normally been staffed by approximately eight attorneys, two of which devoted full time to certain specialized fields, such as violations of those provisions concerning elections. See *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85 Cong., 1st Ses., p. 222 (1957).

The functions and purposes of the Civil Rights Division, according to the attorney general, are:

> ". . . to make a study of the provisions of the Constitution of the United States and acts of Congress relating to civil rights with reference to present conditions, to make appropriate recommendations in respect thereto, and to direct, supervise, and conduct prosecutions of violations of the provisions of the Constitution or acts of Congress guaranteeing civil rights to individuals." Order of the Attorney General, No. 3204 (Feb. 3, 1939).

In the performance of its duties the Division adopted what was declared to be "a policy of strict self-limitation." This policy was based partly on the fact that civil rights prosecutions involve the delicate relationship between the federal and state governments, particularly since violations of federal civil rights legislation usually constitute violations of state law as well. Furthermore, the defendant may often be a state or local official of some prominence in the community, whereas the complainant is not necessarily a respected member of the community. See 1957 Hearings, p. 222. This policy of self-limitation was set forth in the *Annual Report of the Attorney General* (1939):

> "When violations of such statutes are reported, the department requires that efforts be made to encourage state officials to take appropriate action under state law. To insure consistent observance of this policy in the enforcement of the civil rights statutes, all United States Attorneys have been instructed to submit cases to the department for approval before prosecutions or investigations are instituted. The number of prosecutions which have been brought under the civil rights statutes is small."

Prosecutions under the civil rights statutes are usually handled by the United States District Attorney and his staff, rather than by the Civil Rights Division. The services of the Division are available at all stages of the litigation, however, and it often prepares appellate briefs for the U.S. attorney. In addition, the United States through the Division acts as amicus curiae in important civil rights litigation. See, *e.g.*, *Brewer v. Hoxie School District*, 238 F.2d 91, 1 Race Rel. L. Rep. 1027 (8th Cir. 1956). Compare the participation of the Department of Justice representatives in the Little Rock litigation, 2 Race Rel. L. Rep. 931-965 (1957).

Heretofore, the Division has been responsible only for the criminal sections of the civil rights statutes. The Civil Rights Act of 1957, however,

extends the responsibility of the Division in that it vests in the Attorney General power to institute civil actions or appropriate proceedings for preventive relief against persons alleged to have deprived or to be threatening to deprive another of certain voting rights.

III Civil Rights Legislation Currently In Force

The provisions of the Civil Rights Acts, as amended, which are still in force are divided into three titles of the United States Code. Title 18, the Criminal Code, contains those provisions which impose criminal penalties for deprivation of civil rights. The Judicial Code, title 28, contains those relating to federal jurisdiction. See 2 Race Rel. L. Rep. 269, 276 (1957). Title 42, Public Health and Welfare, contains several provisions declaring certain rights to exist and other provisions creating civil remedies for violation of rights. The sections in Titles 18 and 42, setting out the substantive civil rights protected by federal legislation, are printed below.

(a) 18 U.S.C.

§ 241. Conspiracy against rights of citizens.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both. (June 25, 1948, ch. 645, § 1, 62 Stat. 696.)

§ 242. Deprivation of rights under color of law.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both. (June 25, 1948, ch. 645, § 1, 62 Stat. 696.)

§ 243. Exclusion of jurors on account of race or color.

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000. (June 25, 1948, ch. 645, § 1, 62 Stat. 696.)

§ 1581. Peonage; obstructing enforcement.

(a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(b) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in subsection (a). June 25, 1948, ch. 645, § 1, 62 Stat. 772.)

§ 1583. Enticement into slavery.

Whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave; or

Whoever entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645, § 1, 62 Stat. 772.)

§ 1584. Sale into involuntary servitude.

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645, § 1, 62 Stat. 773.)

(b) 42 U.S.C.

§ 1971. Voting Rights.

[(a)] All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

[The following material was added to section 1971 by the Civil Rights Act of 1957].

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

"(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

"(e) Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel.

§ 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (R. S. § 1977.)

§ 1982. Property rights of citizens.

All citizens of the United States shall have the same right, in every State and Territory,

as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. (R. S. § 1978.)

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. § 1979.)

§ 1984. Same; review of proceedings.

All cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court. (Act of Mar. 1, 1875, 18 Stat. 337.)

§ 1985. Conspiracy to interfere with civil rights—(1) Preventing officer from performing duties.

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror.

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or de-

prived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R. S. § 1980.)

§ 1986. Same; action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented, and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action was accrued. (R. S. § 1981.)

§ 1987. Prosecution of violation of certain laws.

The United States attorneys, marshals, and deputy marshals, the commissioners appointed by the district and territorial courts, with power to arrest, imprison, or bail offenders, and every other officer who is especially empowered by the President, are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of section 1990 of this title or of sections 5506–5516 and 5518–5532 of the Revised Statutes, and to cause such persons to be arrested, and imprisoned or bailed, for trial before the court of the United States or the territorial court having cognizance of the offense. (R. S. § 1982; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

§ 1988. Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature in the infliction of punishment on the party found guilty. (R. S. § 722.)

[§ *1989. Omitted*]

§ 1990. Marshal to obey precepts; refusing to receive or execute process.

Every marshal and deputy marshal shall obey and execute all warrants or other process, when directed to him, issued under the provisions of section 1989 of this title. Every marshal and deputy marshal who refuses to receive any warrant or other process when tendered to him, issued in pursuance of the provisions of this section or refuses or neglects to use all proper means diligently to execute the same, shall be liable to a fine in the sum of $1,000, for the benefit of the party aggrieved thereby. (R. S. §§ 1985, 5517.)

[§ *1991. Omitted*]

§ 1992. Speedy trial.

Whenever the President has reason to believe that offenses have been, or are likely to be committed against the provisions of section 1990 of this title or of sections 5506–5516 and 5518–5532 of the Revised Statutes, within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and United States attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons so charged, and it shall be the duty of every judge or other officer, when any such requisition is received by him to attend at the place and for the time therein designated. (R. S. § 1988; June 25, 1948, ch. 646, § 1, 62 Stat. 909.)

[§ *1993. Repealed by Civil Rights Act of 1957.*]

§ 1994. Peonage abolished.

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any person as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void. (R. S. § 1990.)

(c) The Civil Rights Act of 1957

Part V—To Provide Trial by Jury for Proceedings To Punish Criminal Contempts of Court Growing Out of Civil Rights Cases and To Amend the Judicial Code Relating to Federal Jury Qualifications

SEC. 151. In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however*, That in case the accused is a natural person the fine to be paid shall not exceed the sum of $1,000, nor shall imprisonment exceed the term of six months: *Provided further*, That in any such proceeding for criminal contempt, at the discretion of the judge, the accused may be tried with or without a jury: *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

SEC. 152. Section 1861, title 28, of the United States Code is hereby amended to read as follows:

"§ 1861. Qualifications of Federal jurors

"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

"(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(2) He is unable to read, write,

speak, and understand the English language.

"(3) He is incapable, by reason of mental or physical infirmities, to render efficient jury service."

SEC. 161. This Act may be cited as the "Civil Rights Act of 1957".

Approved September 9, 1957.

IV Analysis of Selected Sections

A. Criminal Sections (18 U.S.C.)

1. SECTION 241: CONSPIRACY AGAINST RIGHTS OF CITIZENS.

This section, popularly known as the conspiracy section, was originally section 6 of the Civil Rights Act of 1870, and its constitutionality was discussed in regard to that section. See *United States v. Cruikshank, supra.* Later it became section 5508 of the Revised Statutes.

Since section 241 relates to a "conspiracy against rights of citizens," the technical rules applicable to the crime of conspiracy are applicable to prosecutions under this provision. Thus there must be more than one person involved in the alleged offense, since it is impossible for a person to conspire with himself. If all of the defendants except one are acquitted, it has been held that the conviction of that person must be reversed and the charges dropped. *United States v. Williams,* 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758 (1951), *affirming,* 179 F.2d 644, 656 (5th Cir. 1950). Moreover, an admission of one conspirator, in order to be used in evidence against a co-conspirator, must have been made before the conspiracy has come to an end. If not made during the conspiracy, the admission is not admissible in evidence against a co-conspirator. *Logan v. United States,* 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892).

The conspiracy must be against the rights of "citizens," and this term is "used in a political sense to designate one who has the rights and privileges of a citizen of the State or of the United States." *Baldwin v. Franks, supra,* at 690. Thus, the section was construed as inapplicable to the rights of a Chinese alien, even though those rights were secured by an existing treaty.

Statutory Rights Within Scope

The conspiracy must also be against rights and privileges secured by either the Constitution or the laws of the United States. It has been held that a conspiracy to deprive a person of a statutory right is within the scope of this section. *United States v. Waddell,* 112 U.S. 76, 5 S.Ct. 35, 28 L.Ed. 673 (1884). In that case, the Supreme Court held that a conspiracy to obstruct the rights conferred by congressional enactment, of a person to establish a homestead in unoccupied public land, came within the purview of the conspiracy section, since the homestead law in question did not contain provisions for criminal penalties. If this decision should be carried to its logical conclusion, it would appear that section 241 would be applicable to any case in which the purpose of the conspiracy is to deprive a person of the benefits of a statutory right conferred by Congress, if the statute by which the right is conferred contains no criminal penalty itself. However, no reported case which has followed the *Waddell* decision has been found.

One of the most important questions raised under section 241 is whether it is applicable only to those rights and privileges which arise from the fact of citizenship in the United States and which are subject to protection against interference by individual action, or whether it may also be used in regard to those rights and privileges which arise from the fact of citizenship in a state and which are subject to protection against interference by state action only. This question was before the Supreme Court in *United States v. Williams, supra.* The defendant Williams, a private detective who was a special police officer of the city of Miami, Florida, had been hired by a manufacturing company to ascertain the identity of certain persons who had been stealing property owned by the corporation. Williams and the other defendants, having beaten some of the suspects until they confessed, were indicted under sections 241 and 242 of the Criminal Code for conspiracy to injure citizens of the United States in the free exercise and enjoyment of rights secured

by the Fourteenth Amendment. State action was alleged to exist because Williams was a special police officer. Mr. Justice Frankfurter, speaking for himself and three other justices, said that section 241 was applicable only to those rights which arise from the substantive powers of the federal government, which Congress can beyond doubt constitutionally secure against interference by private individuals, and which "arise from the relation of the victim and the Federal Government." 341 U.S. at 73, 81. Frankfurter reasoned that since interference with civil rights by state officials was covered by section 242 and the general conspiracy statute, 18 U.S.C. § 371 (1952), there was no need to include conspiracies among state officials in section 241. Further, the legislative history of section 241 indicated that it was meant to apply only where private action was involved, since it was a part of the statute designed to restrict the activities of the Ku Klux Klan. Finally, any other construction of the section would raise doubts as to its constitutionality in that the section appeared to be vague. On the other hand, the opinion of Mr. Justice Douglas, also representing the views of four justices, was to the effect that section 241 was not restricted to constitutional rights secured from invasion by private action, but extended to those protected against state action as well. He drew an analogy between the language of section 241 and 242, which was the same in this respect. The deciding vote was cast by Mr. Justice Black, who concurred with Frankfurter on other grounds.

Section 241 Restricted

The *Williams* decision, therefore, restricted section 241 to those cases in which the right alleged to have been violated arose from the relation of the complainant to the federal government—*i.e.*, as an incident to national citizenship. Included within this category are: the right to vote in federal elections, *Ex Parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); the right of a voter in a federal election to have his ballot fairly counted, *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944); the right to be free from mob violence while in the custody of a federal officer, *Logan v. United States, supra;* the right to assemble and discuss federal problems, *United States v. Cruikshank, supra;* the right to testify in the federal courts, *Foss v. United States*, 266 Fed. 881 (9th Cir. 1920); the right to inform federal authorities of a violation of federal law, *In re Quarles*, 158 U.S. 532, 15 S.Ct. 957, 39 L.Ed. 1080 (1895); *Nicholson v. United States*, 79 F.2d 387 (8th Cir. 1935); *Hawkins v. State*, 293 Fed. 586 (5th Cir. 1923); the right of a citizen to have execution of a federal court order in his favor, *United States v. Lancaster*, 44 Fed. 885, 896 (W.D. Ga. 1890); the right of a federal officer to be free from interference in the performance of his duties, *McDonald v. United States*, 9 F.2d 506 (8th Cir. 1925); *United States v. Patrick*, 54 Fed. 338 (M.D. Tenn. 1893); the right to perform a duty imposed by the Federal Constitution without interference, *Brewer v. Hoxie School District, supra;* the right to be free from slavery and involuntary servitude, *Smith v. United States*, 157 Fed. 721 (8th Cir. 1907). See also the discussion of the rights guaranteed by the privileges and immunities clause of the Fourteenth Amendment, *supra*, and *Crandall v. Nevada*, 6 Wall. 35, 44, 18 L.Ed. 745 (1868).

2. Section 242: Deprivation of Rights Under Color of Law

This section was originally section 2 of the Civil Rights Act of 1866, and later, section 5510 of the Revised Statutes (1873). In 1909 it was amended by adding the word, "willfully," 35 Stat. 1092; as will be pointed out, this amendment was of extreme importance.

Section 242 provides criminal sanctions against persons who, acting under color of any law, willfully deprive another of rights secured by the Constitution or laws of the United States. Unlike section 241, its language does not restrict it to the deprivation of rights of "citizens," nor does it refer to a conspiracy. Furthermore, it is not limited to those constitutional rights which arise by virtue of national citizenship.

Only two reported cases decided prior to 1939 have been found which involved prosecutions under section 242. *United States v. Buntin*, 10 Fed. 730 (S.D. Ohio 1882); *United States v. Stone*, 188 Fed. 836 (D. Md. 1911). Neither of these are of importance in the interpretation of the statute at the present time.

In recent years, however, a number of signi-

ficant cases have construed and applied this provision. In *United States v. Classic, supra,* it was contended that section 242 applied only to deprivation of rights on account of race or color or because the individual whose rights were infringed was an alien. The Supreme Court rejected this argument, saying that the section defined two distinct offenses. In the first place, the section makes it a misdemeanor for any person acting under color of law willfully to subject any inhabitant to the deprivation of rights, privileges and immunities secured by the Constitution or laws of the United States. Secondly, the section is violated if any person acting under color of law willfully subjects another to discriminatory "punishment, pains or penalties" because of his color or race or because he is an alien.

Section 242 Tested

The constitutionality of section 242 was tested in *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). Screws, the sheriff of Baker County, Georgia, with the assistance of a policeman and a deputy sheriff, arrested one Hall, a Negro, under a warrant charging him with theft of a tire. He was taken to the courthouse, and subjected to a severe beating which resulted in his death. The sheriff and his assistants were indicted under section 242 and the general conspiracy statute, 18 U.S.C. § 371 (1952). It was contended that section 242 was unconstitutional, insofar as it made the deprivation of rights secured by the Fourteenth Amendment a crime, since there was no ascertainable standard of guilt. The definitions given to the Fourteenth Amendment rights, it was said, were too vague to support criminal prosecution. The court sustained the section against this attack, largely on the basis that Congress had inserted the word "willfully." Thus, the section not only required a general wrongful intent, but "the specific intent . . . to deprive a person of a right which has been made specific whether by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104. In illustrating the intent required, the court used the case of a local officer who persisted in enforcing an ordinance which had been declared unconstitutional on the ground that it violated freedom of speech or of worship or one who continued to select jurors in a manner which had been declared discriminatory and in violation of due process. The officer in such a case has willfully defied announced rules of law.

That section 242 was constitutional and not subject to attack on grounds of vagueness was reaffirmed in *Williams v. United States, supra.* The Supreme Court declared:

> "But where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused by force and violence, they violate one of the most fundamental, basic and well-established constitutional rights which every citizen enjoys." 341 U.S. at 101-02.

The requirement of the specific intent is, therefore, of extreme importance. Indeed, failure to instruct the jury properly on the explicit meaning of "willfully to deprive" will invalidate a conviction. *Pullen v. United States,* 164 F.2d 756 (5th Cir. 1947).

Other Requirements

In addition to the requirement of willfullness, section 242 requires that a person charged with depriving another of rights shall have acted under the color of law, statute, ordinance, regulation, or custom. In *United States v. Classic, supra,* the court defined the phrase "color of law" as follows:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. at 326.

This definition was also adopted in *Screws v. United States, supra,* when the court referred to action under the "pretense" of law. Moreover, action under the color of law may "include, but does not necessarily mean, under authority of law." *United States v. Jones,* 207 F.2d 785, 786-87 (5th Cir. 1953). See also *Ex parte Virginia,* 100 U.S. 339, 25 L.Ed. 676 (1880); *Home Tel. and Tel. Co. v. Los Angeles,* 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913).

Action may be under the color of law even if the particular action taken was in violation of

the law. Thus, even if an officer of the state or federal government violates the law of the state or United States in depriving another of the rights protected by section 242, he may be prosecuted for a federal crime. *United States v. Trierweiler,* 52 F.Supp. 4 (E.D. Ill. 1943); *United States v. Jones, supra.* See also *Screws v. United States, supra.* It should also be noted that the mere fact that the officer removes his badge and states that his acts would not be done in the name of the law will not relieve him from a criminal prosecution under section 242. *Catlette v. United States,* 132 F.2d 902 (4th Cir. 1943).

Section 242 is based upon rights secured or protected by the Constitution or laws of the United States. In *Lynch v. United States,* 189 F.2d 476 (5th Cir. 1951), certain of these rights, as secured by the due process and equal protection clauses of the Fourteenth Amendment, were spelled out:

> ". . . the right of persons under state arrest not to be deprived of their personal security (which is embraced within the word 'liberty') except in accord with due process of law, and also the rights of such persons to equal protection of the laws. 'Equal protection of the law' in turn includes the right to be tried and punished in the same manner as others accused of crime are tried and punished, the right to protection from injury from the officers having them in charge, and the right of protection by the officers from injury sought to be inflicted upon them as prisoners from third persons." 189 F.2d at 479.

In this case the police officers failed to protect their prisoners, turning them over to a mob. Moreover, even though the denial of equal protection is usually limited to affirmative actions, the state may also deny a person the equal protection of the laws by culpable inaction. See *United States v. Blackburn,* Fed. Cas. No. 14,603 (W.D. Mo. 1874); *State Action,* 2 Race Rel. L. Rep. 613, 631 (1957). It has been suggested that this doctrine greatly extends the scope of section 242:

> "This necessarily implies a constitutional doctrine of great potential importance; that a state may violate the Fourteenth Amendment by failure to give effective enforcement of its own laws." Frantz, *The New Supreme Court Decision on the Federal Civil Rights Statutes,* 11 Law. Guild Rev. 142 (1951).

Other rights which are within the scope of section 242 include freedom of speech, freedom of press and freedom of religion. *Catlette v. United States, supra.*

3. Section 243: Exclusion of Jurors on Account of Race or Color

This section was originally section 4 of the Act of March 1, 1875, and in 1948 was transferred from 8 U.S.C. § 44 to its present place in the Criminal Code. 62 Stat. 696. By the provisions of this section, it is a crime for one charged by the state or federal government with the duty of selecting grand or petit juries to exclude therefrom any citizen, otherwise qualified, solely on the basis of race, color or previous condition of servitude.

The constitutional basis of section 243 is found in the well-established principle that the state or federal government may not, under the equal protection clause, discriminate on those bases in the selection of grand or petit juries. *Norris v. Alabama,* 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Strauder v. West Virginia,* 100 U.S. 303, 25 L.Ed. 664 (1880). Not only does the accused in a criminal proceeding have, under those decisions, a right to have his case submitted to a grand or petit jury from which members of his own race or color have not systematically excluded, but further, the *Strauder* case indicates that a citizen has a right to participate in the administration of the law without discrimination because of race or color.

This is not to say, however, that the state may not impose reasonable qualifications for jurors, as long as the qualifications are not based on race or color, nor that the accused has a right in every case to a mixed jury. It has been specifically pointed out that the accused has no such right, and that the only right guaranteed by the Fourteenth Amendment is that in the selection of jurors the state will not discriminate on the basis of race, color or previous condition of servitude. See *Virginia v. Rives,* 100 U.S. 313, 25 L.Ed. 667 (1880).

Jury Exclusion Is Violation

The systematic exclusion of citizens from juries solely because of race or color, if attributable to the state, violates the equal protection

clause of the Fourteenth Amendment, whether accomplished by legislative or administrative action. *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1880). It is, however, important to distinguish between discrimination by statute and by administrative action. The statute, on its face, will usually establish a *prima facie* case of exclusion. To show exclusion by administrative action, however, it is necessary to prove that the manner in which the jury was selected involved a systematic exclusion of persons, otherwise qualified, solely because of race or color. This proof may be provided by a showing that the result of the administration of a statute reasonable on its face has consistently been to exclude those of a certain race or color. See *Williams v. Georgia*, 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed. 1161, 1 Race Rel. L. Rep. 29 (1955); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954); *Neal v. Delaware, supra. Hernandez v. Texas, supra*, also points out that the class against which the discrimination is alleged is not limited to Negro and white. Moreover, the aggrieved party must show that the group excluded constitutes a class.

One of the first cases in which the constitutionality of this section was challenged was *Ex parte Virginia, supra*. In that case a Virginia judge was tried and convicted of excluding citizens from juries in his court solely on the basis of race or color. He sought release on a writ of habeas corpus. The court refused to grant the writ, holding that the judge in performing this ministerial function violated the Fourteenth Amendment, and that Congress had the power to make such a violation a crime. See also *Gibson v. Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075 (1896).

4. Section 1581: Peonage

This section, originally a part of the Anti-Peonage Act of 1867, is based upon the Thirteenth Amendment and is designed to outlaw peonage. It extends to the action of individuals, whether acting under color of law or otherwise. *United States v. Gaskin*, 320 U.S. 527, 64 S.Ct. 318, 88 L.Ed. 287 (1944).

Peonage has been defined "as a status or condition of compulsory service, based upon the indebtedness of the peon to the master." *Clyatt v. United States*, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726 (1905). Apparently the fact of indebtedness is an essential element. See *United States v. Reynolds*, 235 U.S. 133, 35 S.Ct. 86, 59 L.Ed. 162 (1914); *In re Peonage Charge*, 138 Fed. 686 (N.D. Fla. 1905). It is sufficient to allege and prove that a person is being held against his will to work out a debt. *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944), *cert. denied*, 324 U.S. 873, 65, S.Ct. 1011, 89, L.Ed. 1427 (1945). Moreover, each of the acts of holding, arresting or returning a person to a condition of peonage, under the disjunctive phrasing of the section, will constitute a separate offense. *United States v. Goslin, supra.*

For a more extensive discussion of the anti-peonage act, including criminal and civil parts, see discussion of 42 U.S.C. § 1994 (1952) *infra.*

5. Sections 1583 and 1584: Enticement or Sale into Slavery

These sections are referred to as the Slave Kidnapping Acts, and like section 1581, are based on the Thirteenth Amendment. Few prosecutions have been brought under them.

The term "slave" has been defined as:

> "A person who is wholly subject to the will of another, one who has no freedom of action and whose person and services are wholly under the control of another, and who is in a state of enforced compulsory service to another." *United States v. Ingalls*, 73 F.Supp. 76, 78 (S.D. Calif. 1947).

In two unreported cases, *United States v. Francesco Sabbin* (S.D.N.Y. 1907) and *United States v. Peaches*, (E.D. Ark. 1937), the word "slave" was defined to include all persons held in forced detention, rather than limiting its meaning to those cases in which the person was held as legal property of another.

B. Civil Sections (42 U.S.C.)

1. Section 1971: Voting Rights

In a subsequent study, the subject of voting rights, including those protected by section 1971 as amended by the Civil Rights Act of 1957, will be extensively treated. Therefore, only a brief summary of this section will be given here.

Section 1971 was amended by the Civil Rights Act of 1957, which added subsections (b) through (e). Subsection (a) is derived from the Civil Rights Act of 1870. Although subsections (b) through (e) have not been before

the courts at this time, subsection (a) has been sustained as a valid exercise of congressional power under the Fifteenth Amendment. See *In re Engle*, Fed. Cas. No. 4,488 (C.C.D. Md. 1877).

Subsection (a) declares that all citizens shall be allowed to vote without regard to race, color or previous condition of servitude, and subsection (b) declares that no person shall intimidate, threaten or coerce, or attempt to intimidate, threaten or coerce another for the purpose of interfering with his right to vote in any election in which a federal officer is to be selected. The provision expressly includes general, special and primary elections, and expressly declares that the action need not be taken under color of law to constitute the offensive conduct.

Section 1971 (c) gives the Attorney General of the United States the power to institute, for or in the name of the United States, any civil action or proper proceeding for preventive relief, whenever any person has deprived or is about to deprive another of the rights secured in subsections (a) and (b). See discussion, 71 Harv. L. Rev. 573 (1958). Subsection (d) gives the federal district court jurisdiction of the proceedings instituted under subsection (c). Moreover, it provides that the federal court should entertain such proceedings without requiring the party aggrieved to exhaust state administrative or other remedies. Subsection (e) provides for the rights of a person cited for contempt of an order issued in an action instituted under this section.

2. Sections 1981 and 1982: Equal Rights Under the Law

The substance of sections 1981 and 1982 was originally enacted as the first section of the Civil Rights Act of 1865, for the purpose of implementing the Thirteenth Amendment prohibition against slavery or involuntary servitude. It was reasoned that to deny a citizen equality with other citizens in regard to the rights and privileges mentioned was to subject him to involuntary servitude. See Justice Field, dissenting in the *Slaughter-House Cases, supra,* at 91-92; *Ex Parte Riggins,* 134 Fed. 404, 407-8 (1904). Though the Supreme Court subsequently ruled that the statute was not valid as an enforcement act under the Thirteenth Amendment, *United States v. Harris, supra,* at 641, Congress had already reenacted the provision with minor revisions, as section 16 of the Civil Rights Act of 1870, which was validly adopted under the congressional power to legislate for the enforcement of the Fourteenth Amendment. *Gibson v. Mississippi, supra; Martinez v. Fox Valley Bus Lines,* 17 F.Supp. 576 (N.D. Ill. 1936). "This act puts in the form of a statute what had been substantially ordained by the constitutional amendment." *Strauder v. West Virginia, supra,* at 312.

Thus, these sections seek to place Negroes in an equal position with members of the white race, insofar as the specified civil rights are concerned. *Virginia v. Rives,* 100 U.S. 313, 25 L.Ed. 667 (1879). That this purpose of securing equality of rights as between the races limits the scope of the rights created under the sections 1981 and 1982 was demonstrated in *Agnew v. City of Compton,* 239 F.2d 226 (1956), in which an action for damages and for injunctive and declaratory relief was brought against a city and its officers on the ground that plaintiff was being denied the right to carry on the business of electrical contracting because he had no city license. In dismissing the complaint, the court declared:

> "The plain purpose of these statutes is to provide for equality of rights as between persons of different races. The complaint under review does not allege that appellant was deprived of any right which, under similar circumstances, would have been accorded a person of a different race. It follows that no cause of action is stated under these sections." 239 F.2d at 230.

Applies Only to State Action

Inasmuch as the Fourteenth Amendment is the basis for the rights protected by these sections, the protection under them applies only against state action, and not against purely private action. The Supreme Court long ago placed this restriction on legislation adopted to enforce that amendment:

> "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against the State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers executive or

judicial when these are subversive of the fundamental rights specified in the amendment." *Civil Rights Cases, supra,* 109 U.S. at 11.

However, recent expansion of the scope of the concept of state action has provided a basis for the extension of the relief which may be given under these sections. For example, in *Kerr v. Enoch Pratt Free Library,* 149 F.2d 212 (4th Cir.), *cert. denied,* 326 U.S. 721, 66 S.Ct. 26, 90 L.Ed. 427 (1945) a Negro's rights under section 1981 were held to be violated by a refusal, based on the fact of her race, to admit her to the training school operated by a library which was under the management of a private board of trustees but which received some financial support and was subject to some supervision by the city. The court observed that it "should not be governed merely by technical rules of law, but should appraise the facts in order to determine whether the board of trustees . . . may be classified as 'representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.'" 149 F.2d at 215. But see *Charlotte Park and Recreation Com'n v. Barringer,* 242 N.C. 311, 88 S.E.2d 114, 1 Race Rel. L. Rep. 164 *cert. denied,* 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed. 851 (1955). For further discussion of the meaning of the term "state action," see 1 Race Rel. L. Rep. 613 (1956).

Persons Protected

Though the Civil Rights Acts were originally adopted for the protection of the Negro, the rights conferred by these statutes are not limited to colored persons, but rather extend to white persons as well. *Kentucky v. Powers,* 139 Fed. 452 at 459 (E.D. Ky. 1905), *rev'd on other grounds,* 201 U.S. 1, 26 S.Ct. 387, 50 L.Ed. 633 (1905); *Santa Clara v. Southern Pac. R. Co.,* 18 Fed. 385, 398 (C.C.D. Cal. 1883). The protection extended under section 1982 is limited to "citizens of the United States," but under section 1981, "all persons within the jurisdiction of the United States" are included, and the word "persons" has been broadly construed. As early as 1880 it was declared that section 1981 was enacted in consonance with the terms of the Fourteenth Amendment, and therefore:

> "In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the Constitution. . . ." *In re Parrott,* 1 Fed. 481, 509 (C.C.D. Cal. 1880).

One need not be a citizen or resident of the state in order to be a "person" entitled equally with the state's citizens to protection of the laws and to remedies for infringement thereof. *Steed v. Harvey,* 18 Utah 367, 54 Pac. 1011 (1898). Aliens are also protected. *Takahashi v. Fish and Game Com'n,* 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948). The right "to sue," as granted in section 1981, has been recognized to extend even to an alien who had entered the country illegally and was subject to deportation, *Martinez v. Fox Valley Bus Lines, supra;* and an alien whose naturalization had been canceled because of the commission of perjury in the application for citizenship and who was under a deportation order was held to have the capacity to enter into an insurance contract. *Roberto v. Hartford Fire Ins. Co.,* 177 F.2d 811 (7th Cir. 1949), *cert. denied,* 339 U.S. 920, 70 S.Ct. 622, 94 L.Ed. 1343 (1950).

Charges Often Combined

In the cases in which rights protected under sections 1981 and 1982 are sought to be enforced, the complaints frequently combine charges of violations of both these sections and of section 1983 (see discussion, *infra*) and general allegations of deprivations of rights under the Fourteenth Amendment; and the opinions of the courts in cases granting relief often fail to indicate the specific basis upon which a violation of rights is found. Because of this tendency and because of the apparent overlapping of the coverage of the three sections, the cases cannot be classified with exactness in regard to the section being applied.

Several recent decisions sustaining the right of Negroes to be free from discrimination in the use of publicly owned recreational facilities for which admission charges are made have been based at least partly on the right "to make and enforce contracts," under section 1981. *Valle v. Stengel,* 176 F.2d 697, 702 (3rd Cir. 1949) (swimming pool); *Williams v. Kansas City,* 104 F.Supp. 848, 859 (W.D. Mo. 1952) (swimming

pool). In similar cases, section 1981 has been used as a basis for decision, without any specific terms being indicated as controlling. *Holmes v. City of Atlanta*, 124 F.Supp. 290, 1 Race Rel. L. Rep. 146 (N.D. Ga. 1954), *aff'd*, 223 F.2d 93 (5th Cir. 1955), rev'd, 350 U.S. 879, 1 Race Rel. L. Rep. 14, (golf course); *Easterly v. Dempster*, 112 F.Supp. 214 (E.D. Tenn. 1953) (relief denied because city leased golf course to private corporation "for financial reasons" subsequent to filing of complaint). See *Hayes v. Crutcher*, 137 F.Supp. 853, 1 Race Rel. L. Rep. 346 (M.D. Tenn. 1956) and *Ward v. City of Miami*, 151 F.Supp. 593, 2 Race Rel. L. Rep. 603 (S.D. Fla. 1957), expressly relying on the *Holmes* case in granting the same relief, but not mentioning section 1981 as a basis for the decision.

The contract term of section 1981 was also held to render invalid constitutional provisions and statutes of California prohibiting the employment of Chinese by any corporation formed under the laws of the state. *In re Parrott, supra*, at 509.

Property Interests Protected

Both sections 1981 and 1982 have been invoked to afford protection to various types of property interests. In two cases decided thirty years apart, the Supreme Court applied section 1982 to prohibit the enforcement of racial segregation in housing. *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), held that a municipal ordinance forbidding members of one race to occupy houses in areas occupied mainly by members of the other race deprived persons of their civil rights to purchase, enjoy and use property without discrimination based on their race alone. The court declared:

> "[Section 1982] expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. . . . These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. . . .
>
> ". . . .
>
> ". . . . The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person." 245 U.S. at 78-79, 81. See also *Crist v. Henshaw*, 106 Okla. 168, 163 P.2d. 214 (1945) (state statute cannot forbid sale of property to Negroes).

In *Hurd v. Hodge*, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187 (1948), the court took the further step of declaring that while private racial restrictive agreements in deeds are not invalidated by section 1982, yet judicial enforcement of such covenants by the federal courts in the District of Columbia is prohibited by the rights to "purchase, lease, sell, hold and convey real . . . property" as recognized by that section, because judicial enforcement constitutes governmental action. Compare *Charlotte Park and Recreation Com'n v. Barringer, supra*, holding that these sections do not prohibit the conveyance of a fee determinable on the limitation that the land shall not be used by members of another race, and that since this limitation operates automatically to terminate the estate of the grantee if the condition is violated, no judicial enforcement will be involved to constitute state action.

Several recent federal cases have held that the exclusion of Negroes from municipal housing facilities which were built with public funds is a violation of the rights to lease property without discrimination on account of race. *Jones v. City of Hamtramck*, 121 F.Supp. 123 (E.D. Mich. 1954); *Vann v. Toledo Metropolitan Housing Authority*, 113 F.Supp. 210 (N.D. Ohio 1953). The latter court observed:

> "The trend of all of the later cases involving property rights [as distinguished from "the mere right to a public service"] is to conform strictly with the requirements of the Fourteenth Amendment and of the Civil Rights Statutes." 113 F.Supp. at 212.

Less tangible types of property interests were given protection under sections 1981 and 1982 in *State v. Ikeda*, 61 Ariz. 41, 143 P.2d 880 (1943) (invalidating state statute designed to restrict the right of persons of Japanese ancestry to enter into commercial transactions); *Martinsen v. Mullaney*, 85 F.Supp. 76 (D. Alaska 1949) (invalidating license tax imposing greater levy on non-resident fishermen than on resident fishermen); *Mills v. Board of Education*, 30 F. Supp. 245 (D. Md. 1939) (enjoining operation of public school teachers' salary scales which discriminated against Negro teachers).

A variety of rights related to judicial proceed-

ings have been recognized by the courts as included within the terms of section 1981. *State v. Smith,* 93 Atl. 353 (R.I. 1915) (right of Negro accused of crime to protection against exclusion of Negroes from jury solely on account of race; no such exclusion found); *Kelley v. State,* 25 Ark. 392 (1869) (right of Negro to be witness against white person in court proceedings; state law preventing such invalidated); *United States v. Horton,* Fed. Cas. No. 15,392 (N.D. Ala. 1867) (opinion unreported) (inflicting on a Negro the punishment of banishment from the state violated rights under Civil Rights Acts).

Marriage Not Affected

The courts are usually in agreement that neither the Fourteenth Amendment nor the Civil Rights Acts create a right to marry a person of another race, and therefore do not invalidate state miscegenation statutes. In the year following the adoption of the second Civil Rights Act, a federal court observed:

> "The marriage relation, which is a civil institution, has hitherto been regulated and controlled by each state within its own territorial limits, and I cannot think it was intended to be restrained by the [Fourteenth] amendment, so long as the state marriage regulations do not deny the citizen the equal protection of the laws. Nor do I think the state law operates unequally; the marriage relation between whites and colored cannot exist under the statutes of this state—it is null and void as to both." *In re Hobbs,* 12 Fed. Cas. No. 6,550 (C.C.N.D. Ga. 1871). Cf. *Perez v. Leppold,* 198 P.2d 17 (Calif. 1948).

In *Stevens v. United States,* 146 F.2d 120 (10th Cir. 1944), the Oklahoma miscegenation laws were held not to violate either the Fourteenth Amendment or section 1981. In regard to the latter, the court declared:

> "The statute does not merely forbid a person of African descent to intermarry with a person of other race or descent. It equally forbids a person of other race or descent to intermarry with a person of African descent. And the succeeding section prescribes the same punishment for both offenders. There is no discrimination against the colored race, within the purview of the Civil Rights Bill." 146 F.2d at 123. See also *Green v. State,* 58 Ala. 190, 192 (1877).

In *Pace v. Alabama,* 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207 (1883), a Negro convicted of living in adultery with a white woman, contested his conviction on the ground that he was denied equal protection of the laws because the statutory penalty for adultery committed by two members of different races was more severe than that for adultery committed by two members of the same race. The Supreme Court, in holding that these two statutes did not involve any discrimination against either race, stated:

> ". . . the purpose [of the equal protection clause of the Fourteenth Amendment and section 1981] . . . was to prevent hostile and discriminatory state legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment." 106 U.S. at 584.

3. Section 1983: Civil Action for Deprivation of Rights

This provision was originally found in section 1 of the Civil Rights Act of 1871. It gives a person who has been deprived of his rights, privileges or immunities under the Constitution or laws of the United States a means of obtaining civil redress against the one who caused the deprivation, if the defendant was acting under color of law, custom or usage.

Section 1983 is the civil counterpart to section 242 of the Criminal Code. These two sections have been construed as in *pari materia. Picking v. Pennsylvania R. Co.,* 151 F.2d 240 (3rd Cir. 1945); *McShane v. Moldovan,* 172 F.2d 1016 (6th Cir. 1949). See discussion of section 242, *supra.*

Mr. Justice Stone, in *Hague v. CIO,* 307 U.S. 496, 526, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), declared that this section "includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment." Some of the lower federal courts, however, have ap-

parently tried to limit its application to the rights secured by the due process clause, on the ground that the rights secured by the equal protection clause are protected by section 1985, the conspiracy section. *McShane v. Moldovan, supra.* See also *Tinsley v. Anderson,* 171 U.S. 101, 18 S.Ct. 805, 43 L.Ed. 91 (1898); *Bottone v. Lindsley,* 170 F.2d 705 (10th Cir. 1948); *Mitchell v. Greenough,* 100 F.2d 184 (9th Cir. 1938). Cf. *Nixon v. Herndon,* 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Valle v. Stengel, supra; Agnew v. City of Compton, supra,* at 234. In this latter group of cases, the courts applied section 1983 to cases in which rights secured by the equal protection clause were involved. See Poole, *Statutory Remedies for the Protection of Civil Rights,* 32 Ore. L. Rev. 210 (1953).

Further uncertainty regarding the effectiveness of the remedy afforded under section 1893 arises from the question of whether the deprivation of rights charged must have been wilfully committed. This section, as distinguished from its criminal counterpart, section 242, does not contain the express requirement of wilfulness, and that factor has been judicially noted as indicating that wilful action need not be shown to sustain a cause of action. In this respect, one court has observed:

> ". . . Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law. A field was created upon which a state officer could not tread without being guilty of trespass and liable in damages." *Picking v. Pennsylvania R. Co., supra,* at 249. See also *Burt v. City of New York,* 156 F.2d 791, 792 (2d Cir. 1946).

However, several lower federal courts have refused to recognize a cause of action under this section unless something close to wilfulness is charged against the defendant. Thus, in *Jinks v. Hodge,* 11 F.R.D. 346, 348 (E.D. Tenn. 1951), the action was dismissed because, among other things:

> "The complaint does not specify any particular acts showing either the intention to wilfully and purposely deprive each individual plaintiff of a right guaranteed by the United States Constitution or laws, or to wilfully and purposely deprive each of them personally of the equal protection of the law." See also *Dye v. Cox,* 125 F. Supp. 714, 715 (E.D. Va. 1954).

The argument has been advanced that this tendency to read a requirement into the section which its words do not suggest defeats the "manifest intended utility" of the statute. Lowrey, *Civil Actions Under Violations of Civil Rights,* 7 Baylor L. Rev. 224 (1955).

It is to be noted that the statute provides for liability against "persons," which has been interpreted to mean only individuals, so that actions cannot be brought against the state or its governmental subdivisions, even though the public officials of such agencies were the individuals accused of the deprivation of rights. *Charlton v. City of Hialeah,* 188 F.2d 421 (5th Cir. 1951); *Shuey v. Michigan,* 106 F. Supp. 32 (E.D. Mich. 1952). See *Insular Police Com'n v. Lopez,* 160 F.2d 673, 676 (1st Cir. 1947). Some courts seem to have suggested, however, that if the deprivation arises in regard to the action of a municipality in its proprietary, as distinguished from its sovereign capacity, the result might be contrary. See *Hewitt v. City of Jacksonville,* 188 F.2d 423, 424 (5th Cir. 1951); *Agnew v. City of Compton, supra* at 230.

Under Color of Law

A cause of action arises only when the "person" acts "under color of any statute, ordinance, regulation, custom or usage," of any state in causing the deprivation of rights. The courts have regularly construed this phrase to have the same meaning as the very similar terminology in the analogous criminal section (242), and consequently have adopted the language of Mr. Justice Stone in *United States v. Classic, supra:*

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law." 313 U.S. at 326. Quoted in *Picking v. Pennsylvania R. Co., supra,* at 248; *Geach v. Moynahan,* 207 F.2d 714, 717 (7th Cir. 1953) (the fact that defendant police officers exceeded their authority and duty in arresting plaintiff and searching his house without warrants and in detaining him in jail without charges being made and in subjecting him to "third-degree" interrogation, did not prevent their acts from being under color of law); *Condra v. Leslie &*

Clay Coal Co., 101 F. Supp. 774, 777 (E.D. Ky. 1952).

Thus, relief has been denied under this section when the deprivation of rights was caused by an individual acting purely in his private capacity, even though he might be a public officer. *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006 (W.D. Ark. 1949); *Smith v. Jennings*, 148 F. Supp. 641 (W.D. Mich. 1957). The language of *Screws v. United States, supra*, decided under the criminal section, has been found equally applicable to cases brought under the civil section:

> "It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded." 325 U.S. at 111, quoted in *Thompson v. Baker*, 133 F. Supp. 247, 250 (W.D. Ark. 1955).

In *Williams v. Kansas City*, 104 F. Supp. 848 (W.D. Mo. 1952), city park commissioners were enjoined from excluding Negroes from the city swimming pool in violation of the plaintiffs' constitutional rights (there being no equal facilities available for their separate use), even though no state statute or city ordinance authorized the commissioners to enforce segregation at the pool. Though the commissioners were devoid of the power so to segregate the races, in carrying out a "custom" to enforce such a practice they were found to be misusing their general authority to manage park recreational facilities, and so were held to be acting under color of state law.

Birmingham Terminal Case

The court of appeals for the fifth circuit has very recently held in *Baldwin v. Morgan*, 26 U.S.L. Week 2359 (Jan. 28, 1958), that the enforcement of the "custom and usage" of racial segregation in a railroad terminal, by the Alabama Public Service Commissioners, the City Commissioners of Birmingham and the Birmingham Railroad Terminal, violated the rights of Negro passengers under section 1983. Both groups of commissioners were regarded as agents of the State of Alabama, and their actions constituted "state action" because they were acting under their general authority to issue orders and make arrests for violations thereof, even though there was no Alabama statute requiring segregation in terminals. The court declared:

> "If those powers are being misused, either because beyond the power invested in them by the local law or because the use of that power deprives one of a constitutionally protected right, it is still under color of state law. . . .
>
> ". . . such actions are most assuredly [taken] because of their position as public officials and by virtue of an assertion, implied at least, of a claim of authority to take such action. This makes such acts under 'color' of law." Opinion No. 16,717, p. 9.

The Terminal Company's offensive conduct lay in ". . . at least aiding and abetting in the state action condemned by the Fourteenth Amendment and the Civil Rights Act." *Supra*, at 12.

> "State action is indeed required under the Fourteenth Amendment and 42 USCA 1983. But those who directly assist the admitted state agency in carrying out the unlawful action become a part of it and subject to the sanction of Section 1983." *Supra*, at 13.

Immunity of Judicial Officers

Though the statute by its terms provides a remedy against "every person" who commits the deprivation under color of law, the courts have generally agreed that:

> ". . . the common law rule of immunity of a judicial officer for acts done in the exercise of his judicial function, where he has jurisdiction over both parties and the subject matter, has not been abrogated by the Civil Rights Act." *Kenney v. Fox*, 232 F.2d 288, 292 (6th Cir. 1956) (applied to judge and prosecuting attorney).

By virtue of this immunity, cases have been dismissed against a state's attorney and grand jury foreman, *Cawley v. Warren*, 216 F.2d 74 (7th Cir. 1954); a justice of the peace, *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955); an assistant state's attorney and an official court reporter, *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957); a justice of the peace and a constable who served his writ, *Thompson v. Baker, supra;* a probation officer, *Dunn v. Estes*, 117 F. Supp. 146 (D. Mass. 1953); a director of a state mental institution, *Miller v. Director, Middletown State Hospital*, 146 F. Supp. 674 (S.D.N.Y. 1956). These various officials were regarded as exercising either judicial or quasi-judicial functions under the circumstances of the cases involved.

Only Federal Rights Secured

The language of section 1983 clearly indicates that the cause of action created is for the deprivation of rights secured by the Federal Constitution and laws only. It is said that the provision ". . . grants redress only for that which the Fourteenth Amendment condemns and forbids." *Downie v. Powers*, 193 F.2d 760, 765 (10th Cir. 1951). Thus, during the "separate-but-equal" era, no cause of action arose against a city park board for enforcing racial segregation in the use of park recreational facilities, where the facilities available to each race were substantially equal. *Boyer v. Garrett*, 88 F. Supp. 353 (D. Md. 1949), *aff'd* 183 F.2d 582 (4th Cir. 1950). And though the actions of defendant may be in violation of state law and give plaintiff a cause of action for damages in the state courts, no remedy is available under section 1983 unless rights guaranteed by federal law are also infringed. *Valle v. Stengel*, 75 F. Supp. 543 (D.N.J. 1948), *rev'd on other grounds*, 176 F.2d 697 (3d Cir. 1949) (exclusion from privately operated swimming pool because of race in violation of state statute); *Earle C. Anthony, Inc. v. Morrison*, 83 F. Supp. 494 (S.D. Cal. 1948) (exclusion of broadcasting company from courtroom, even if abuse of discretion by judge, violated no federal right). See *Agnew v. City of Compton*, *supra*, at 231.

As authorized by the final phrases of the section, relief has been sought in the form of actions for damages (compensatory and punitive) for past deprivations of rights, suits for injunctions to restrain threatened deprivations, actions for declaratory judgments as to the existence of disputed rights, and various combinations of the foregoing. Though the assertion is often made that a person has no legal standing to seek a remedy for the deprivation of the civil rights of others, *Brown v. Board of Trustees*, 187 F.2d 20, 25 (5th Cir. 1951); *Brown v. Ramsey*, 185 F.2d 225, 227 (8th Cir. 1950), yet it is established that persons who have been subjected to a deprivation of rights within the terms of section 1983 may bring a class action to secure injunctive relief against future deprivation of the rights of plaintiff and those similarly situated. *Beal v. Holcombe*, 193 F.2d 384 (5th Cir. 1951); *Holmes v. City of Atlanta*, *supra*.

In regard to the necessity of exhausting state administrative and judicial remedies as a prerequisite to seeking relief in the federal courts, see 2 Race Rel. L. Rep. 561 (1957) (administrative) and 2 Race Rel. L. Rep. 1215 (1957) (judicial).

4. Sections 1985 and 1986: Conspiracy to Interfere with Civil Rights

These two sections, relating (1) to conspiracies to deprive a person of certain civil rights, and (2) to neglect to prevent such conspiracies, are derived from the so-called "Ku Klux Klan" Act. The offenses toward which they are directed are similar to those covered by 18 U.S.C. § 241 (1952), but the remedy provided is a civil action for damages by the victim of the offensive conduct rather than a criminal prosecution.

Section 1985 is divided into three subsections. The first is concerned with conspiracies to prevent an officer of the United States from performing his duties, while the second deals with conspiracies to obstruct justice or to intimidate parties, jurors or witnesses. These two subsections have been before the courts infrequently, and the few decisions in point do not extend the application of the provisions beyond the scope clearly indicated by the language used therein. Subsection (3) has been the subject of judicial interpretation on numerous occasions and has proved to be the most important part of the section. It is primarily concerned with conspiracies designed to deprive a person of rights, privileges and immunities protected by the three Civil War Amendments. Section 1986 complements section 1985 by providing for civil redress against any person who has knowledge of one of the conspiracies covered by section 1985 and who has the means to prevent it, but neglects to do so. There are no definite decisions on section 1986, but its language would indicate that it is not intended to be limited to public law enforcement officers but rather to extend to any individual who had knowledge of, and means to prevent, a conspiracy. The following discussion will be limited to section 1985(3).

"Conspiracies" Limited

The conspiracies reached by section 1985(3) are limited to those which have the effect of depriving a person of the equal protection of the laws or of equal privileges and immunities under the law. Inasmuch as the essence of the rights intended to be protected is "equality," this

provision does not provide a remedy for conspiracies which deny a person due process of the law. This distinction results from the specific language of the section. The leading case interpreting the subsection is *Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951), in which the Supreme Court said:

> "Passing the argument, fully developed in the Civil Rights Cases, that an individual or group of individuals not in office cannot *deprive* anybody of constitutional rights, though they may invade or violate those rights, it is clear that this statute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of 'equal protection of the law,' or of 'equal privileges and immunities under the law.' That accords with the purpose of the Act to put the lately freed Negro on an equal footing before the law with his former master." 341 U.S. at 661. See also *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955); *Dunn v. Gozzola*, 216 F.2d 709 (1st Cir. 1954).

As long as the conspiracy is for the purpose of depriving another of equal protection or equal privileges, it does not matter whether one of the conspirators is the state. Thus, in *Baldwin v. Morgan, supra*, a private corporation which owned and operated a railroad terminal was said to come under section 1985(3) because it had conspired with the state public service commission and the commissioners of the city in segregating passengers in interstate commerce.

Alternative Cause

In addition to the cause of action given to the injured party under the "conspiracy" clause of section 1985(3), it has been said that an alternative cause of action is found in the "disguise" clause. That is, a person may have a cause of action based on the fact that one or more individuals have gone in disguise on the highway or on the premises of another with the intent to deprive a person of equal protection of the laws or of equal privileges and immunities. See the district court opinion in *Collins v. Hardyman, supra*, 80 F. Supp. 501 (S.D. Calif. 1948). That court also indicated that the word "disguise" was used in the statute in its ordinary sense as a concealment of identity by masks and vestments; the wearing of American Legion hats, even though unauthorized, was not sufficient to constitute a disguise.

It should be noted further that section 1985(3) is divided into two parts, as the Supreme Court indicated in the *Collins* case:

> "The section under which this action is brought falls into two divisions. The forepart defines conspiracies that may become the basis of liability, and the latter portion defines overt acts necessary to consummate the conspiracy as an actionable wrong. . . . [T]his statute does not make the mere agreement or understanding for concerted action which constitutes the forbidden conspiracy an actionable wrong unless it matures into some action that inflicts injury. That, we think, is the significance of the second division of the section." 341 U.S. at 659.

There is apparently little question that insofar as section 1985(3) relates to equal protection of the laws under the Fourteenth Amendment, it is applicable only to those situations in which the act may be attributed to the state. Indeed, the Supreme Court indicated that this was true in the *Collins* case, and in *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1943). However, there is some question concerning whether the section, insofar as it relates to privileges and immunities, creates a cause of action for private conspiracies as well as conspiracies by persons acting pursuant to or under color of law. It should be recalled that the *Slaughter-House Cases* held that the privileges and immunities clause of the Fourteenth Amendment was intended to protect only those privileges and immunities which flow from the fact of national citizenship. It is to be noted that the fifth circuit has very recently held that the privileges and immunities covered by this section include the right to travel in interstate commerce without being segregated by race in a railroad terminal. *Baldwin v. Morgan, supra*. Moreover, if an individual deprives a person of those privileges and immunities, his private action may be restrained or penalized, without regard to whether he was acting pursuant to or under color of law. The Supreme Court has indicated that this same rule may be applied to the privileges and immunities provisions of section 1985(3). See, *e.g.*, *Snowden v. Hughes, supra*. However, there is apparently a split among the circuits on the question. On the one hand, the seventh circuit has said that if the privileges and

immunities involved arise from the fact of national citizenship, section 1985(3) affords redress against private as well as state action. *Miles v. Armstrong,* 207 F.2d 284 (7th Cir. 1953). On the other hand, the eighth circuit has held that the remedy is available only against state action, *Love v. Chandler,* 124 F.2d 785 (8th Cir. 1942), but it apparently was reading the "color of law" provision of section 1983 into section 1985(3).

Judicial Immunity Applicable

The doctrine of judicial immunity, as discussed under section 1983, *supra,* is also applicable to some extent to prevent civil actions under section 1985(3). Compare *Lewis v. Brautigam, supra,* with *Jennings v. Nester,* 217 F.2d 153 (7th Cir.), *cert. denied,* 349 U.S. 958, 75 S.Ct. 888, 99 L.Ed. 1281 (1955). Apparently the doctrine of sovereign immunity is also applicable. See discussion under section 1983, *supra; Agnew v. Compton, supra.*

The injured person, to assert a claim for damages under section 1985, must be a "citizen." Since an unincorporated association is not a "citizen," it has been held that such an association cannot assert a claim for damages under this section. *Robeson v. Farelli,* 94 F.Supp. 62 (S.D. N.Y. 1950).

Section 1985(3), as well as other provisions of the Civil Rights Acts, was said to authorize a federal district court to enjoin interference with public officials seeking to perform duties imposed upon them by the Federal Constitution. *Brewer v. Hoxie School District, supra.*

5. Section 1994: Peonage Abolished

Congress, acting under the so-called enabling clause of the Thirteenth Amendment, adopted the Anti-peonage Act of 1867. This Act, in effect, consisted of two parts. The first abolished peonage and declared any act, law, regulation, custom or usage in any state or territory to the contrary null and void. The second part of the Act established criminal sanctions which could be used against any person who held another in service or labor under the system of peonage. The Supreme Court has described the effect of this Act: "Congress thus raised both a shield and a sword against forced labor because of debt." *Pollock v. Williams,* 322 U.S. 4, 8, 64 S.Ct. 792, 88 L.Ed. 1095 (1944). The Anti-peonage Act has now been divided into its two parts, the first part, the "shield," being found in 42 U.S.C. § 1994 (1952), the section presently under consideration, and the second part being codified in 18 U.S.C. § 1581 (1952), discussed *supra.* Since both of these sections have a common ancestor, most of the authority is applicable to both.

The Anti-peonage Act has been sustained as constitutional, on the ground that it is a valid implementation of the Thirteenth Amendment. See, *e.g., Taylor v. Georgia,* 315 U.S. 25, 62 S.Ct. 415, 86 L.Ed. 615 (1942); *Clyatt v. United States, supra.* It should be remembered from previous discussion that the Thirteenth Amendment and the federal statutes enacted pursuant thereto reach the actions either of a state or of an individual which may be characterized as imposing upon another a condition or status of involuntary servitude, except as punishment for a crime. That is, the requirement of state action which developed under the Fourteenth Amendment is not applicable to the Thirteenth Amendment.

"Peonage" Defined

In discussing the meaning of the term "peonage" as used in the Act, the Supreme Court has said:

> "It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. . . . Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. . . . A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject, like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service." *Clyatt v. United States, supra,* at 215-16.

The person seeking relief need only prove that he is being held against his will and compelled

to work to liquidate a debt, whether real or apparent. It is not necessary to show corruption or violence on the part of the person who is holding another to forced labor, and the law takes no account of the amount of the debt or the means used to coerce the person to work. *Pierce v. United States, supra; United States v. Clements,* 171 Fed. 974 (D.S.C. 1909). Though these definitions were developed under the criminal portion of the Anti-peonage Act, they are applicable also to section 1994, and the definition given in the *Clyatt* case was quoted with approval in *Pollock v. Williams, supra.*

Penal Labor Excluded

The Thirteenth Amendment specifically excludes forced labor when used as punishment for crime, and not all other forced labor comes within the prohibition of the Amendment or the federal statutes. For example, in *Butler v. Perry,* 240 U.S. 328, 36 S.Ct. 258, 60 L.Ed. 672 (1916), the Supreme Court upheld a Florida statute which required "every able-bodied male person" between the ages of 21 and 45, who had resided in a county for thirty days or more, either to pay a certain fee or to work on the public roads or bridges "for six days of not less than ten hours in each year." Refusal to comply subjected the offender to punishment for a misdemeanor. The court drew an analogy to the duties an individual citizen owes to the state, "such as services in the army, militia, on the jury, etc." 240 U.S. at 333. However, in *United States v. Reynolds, supra,* an Alabama statute which authorized a person to become a surety for a convict and to pay his fine and to be reimbursed by labor and which made a refusal to work on the part of the convict a crime, was held unconstitutional. The two men who had obtained convict labor under the statute were subject to criminal prosecution under the Anti-peonage Act.

State statutes making it a misdemeanor to induce a person to advance money or property with intent to defraud by a promise to perform labor or services, and also making the unjustifiable failure to perform the labor or services promised constitute prima facie evidence of intent to defraud, have been attacked as violative of the Thirteenth Amendment and section 1994. In *Bailey v. Alabama,* 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911), the Supreme Court held such a statute unconstitutional and contrary to section 1994. In that case the prima facie evidence portion of the statute had been used to obtain a conviction, and the court held that the presumption in this context was unconstitutional. However, the portion of the state statute which defined the elements of the crime was apparently not considered. Moreover, the same result was reached in *Taylor v. Georgia, supra,* even though the provision defining the elements of the crime and the one containing the presumption were set forth in separate sections. The leading case, which reviews all of the authorities, is *Pollock v. Williams, supra.* The Florida statute, which was substantially the same as the Alabama and Georgia statutes involved in the *Bailey* and *Taylor* cases, read as follows:

> "817.09. *Obtaining property by fraudulent promise to perform labor or service.*
>
> "Any person in this state who shall, with intent to injure and defraud, under and by reason of a contract or promise to perform labor or service, procure or obtain money or other thing of value as a credit, or as advances, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months.
>
> "817.10. *Same; prima facie evidence of fraudulent intent.*
>
> "In all prosecutions for a violation of Section 817.09 the failure or refusal, without just cause, to perform such labor or service or to pay for the money or other thing of value so obtained or procured shall be prima facie evidence of the intent to injure and defraud." Cited in *Pollock v. Williams, supra,* at 5.

In the *Pollock* case, the laborer was convicted on a plea of guilty under the statute, and then petitioned the state courts for a writ of habeas corpus on the ground that the statute violated the Thirteenth Amendment and the Anti-peonage Act. The Florida Supreme Court held that the only part of the statute which was unconstitutional under the *Bailey* and *Taylor* cases was that section which provided for the presumption; therefore, it concluded that since Pollock had pleaded guilty, the presumption section had not been used and Pollock was legally incarcerated. The Supreme Court of the United

States reversed, partly because the legislature had repeatedly re-enacted the statute, including the presumption provision, after the *Bailey* and *Taylor* cases, and partly because Pollock, who was not represented by counsel, had been influenced to plead guilty by the presumption section:

> "Especially in view of the undenied assertions in Pollock's petition we cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. The statute laid its undivided weight upon him. The legislature had not even included a separability clause. Of course the function of the prima facie evidence section is to make it possible to convict when proof of guilt is lacking. . . . [W]e clearly have held that such a presumption is prohibited by the Constitution and the federal statute. The Florida legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing." 322 U.S. at 15.

In order to clear up any confusion surrounding the invalidity of statutes of this type, the Supreme Court analyzed "the basis of constitutional invalidity." First, it examined the purpose of the Thirteenth Amendment and the Anti-peonage Act—namely, "not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States." 322 U.S. at 17. Moreover, the Anti-peonage Act embodied a congressional policy that no indebtedness should warrant a suspension of the right to be free from compulsory service:

> "This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. The federal statutory test is a practical inquiry into the utilization of an act as well as its mere form and terms." 322 U.S. at 18.

The court then found that the substantive section of the state statutes, defining the crime, had the practical effect of allowing or encouraging peonage, and the presumption provision merely added to that effect:

> "It is a mistake to believe that in dealing with statutes of this type we have held the presumption section to be the only source of invalidity. On the contrary, the substantive section was contributed largely to the conclusion of unconstitutionality of the presumption section. The latter in a different context might not be invalid. . . . Absent this feature [involuntary labor to discharge an indebtedness] any objection to prima facie evidence or presumption statutes of the state can arise only under the Fourteenth Amendment, [apparently, the due process clause] rather than under the thirteenth." 322 U.S. at 22.

It would seem therefore, that any statute which had the effect of encouraging forced labor to liquidate an indebtedness would be in violation of section 1994 and the Thirteenth Amendment.

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